THE
BENGAL MONEY-LENDERS ACT

Bengal Act X of 1940.

With Explanatory Notes and Select Committee Report and Notes on Clauses and Cognate Statutes both English and Indian.

BY

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N. M. RAYCHOWDHURY & CO. LTD.

Booksellers & Publishers

72, Harrison Road, Calcutta.

1940

Rs. 2/8/-

Published by
H. GHOSE, B. A.
"Sarat Villa"
26, Giris Mukerjee, Road,
Bhowanipur, Calcutta.

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Printer : S. C. Bose,
Bose Press,
30, Brajonath Mitra Lane,
Calcutta.

PREFACE.

No other piece of legislation enacted within living memory is known to have caused so much commotion in the country as the present statute regarding this law of usury. The practice of lending money on interest prevails not only in this country but also in other countries, and may be traced back to the earliest days of civilisation. The legal history of every nation discloses great fluctuation of popular ideas relating to the question of usury. In whatever way various people might have thought over the system of lending money on interest, the fact remains that it is a great economic institution which will never disappear from our social existence. It may have its abuses but it has also its advantages; otherwise it would have died a natural death long ago. From the earliest times, the jurisconsults of every nation have shown their concern to give the system of usury a right direction and to keep it free from the abuses to which it is prone. But they have thought differently and unanimity of opinion seems never to have been reached in the matter. Some writers have thought it to be beneficient to both the creditors and the debtors and other writers have thought otherway. In the course of their discourses some writers have leaned towards the creditors and others have advocated the cause of the debtors. In Muslim countries, usury was looked down upon with disfavour and was regarded as a great curse and a vice and authoritative injunctions were issued putting a complete ban on it; yet we find that notwithstanding such imperative prohibitions usury has survived even in those countries in some shape or other. It is well known that the Muslim institution of By-bil-wafa is nothing but a device to evade the prohibition as to usury. This fact only demonstrates that the system of lending money on interest has its own utility and that there always is and that there should always be a moral sanction behind it. The only thing that justifies a cry against it is that it readily yields to abuses. Ruin has come to not a few in number in consequence of the system of taking interest. So

interest-taking cannot completely be abolished nor should it be given a very long rope, and an eternal feud has been going on between the philosophers of all nations as to the exact limits within which legitimate money-lending should be kept. This is the history of all legislation up to now undertaken for the purpose of regulating money-lending. The creditors being monied people naturally possess great power and very often exert great control over their debtors but the furtherance of their selfish projects and pursuit of an aggressive policy have their natural repercussion in the shape of great moral indignation roused on the other side leading to active steps against them. The system of usury was at its worst when the British rule was first established in this country and the lot of the borrowers then was hardly better than that of mere slaves. To ameliorate the condition of the poor borrowers the benign East India Company enacted Regulation XV of 1793 to save the poor debtors from the clutches of their creditors. It is interesting to note that the present Act is virtually a revival of this old Regulation. Thereafter there was a counter move in other countries engineered by the capitalists of those places against restriction on usury and it was thought that rural people had much advanced to take care of themselves and that it was improper, if not immoral, to restrict the right of free action and in consequence the Usury Laws Repeal Act of 1854 (17 & 19 Vict., Ch. 90) came to be passed in England and it had its effect on Indian Legislation which manifested itself in the shape of what is called the Usury Laws Repeal Act of 1855 whereby all the Regulations restricting the rate of interest were repealed and absolute freedom was given to the people to enter into any contract they pleased and the Courts were enjoined to respect the private contract of parties. In 1872, the Contract Act made some provision to check penal stipulations reserving high interest by way of punishment in the event of breach of the contract but as exorbitant interest was considered to be not necessarily penal, the provisions of the Contract Act afforded hardly any relief to the debtors, who being completely under the thumb of their oppressive creditors were made to pay very high rates of interest and our Courts, including

even the Privy Council of his Majesty had to declare that however oppressive the bargain for interest might be, they were powerless to disregard the solemn contract of the parties themselves. Our reports show that decrees have been granted even for 75 or 100 p.c. interest. This was shocking, and the Legislature came forward to do for the people what the Courts were reluctant to do. The Indian Contract (Amendment) Act of 1899 was the first proof of the State recognition that the borrower should not be left to their own sad plight but some tangible relief should be offered to them. In England, the Money-lenders Act of 1900 and 1911 were passed to offer relief to the borrowers and the noble example of the English legislators came to be emulated by their Indian compeers and the Usurious Loans Act of 1918 was the result. These Acts offered relief only when the loan-transactions were unconscionable and substantially unfair. These statutes notwithstanding their bright appearances did not prove very much beneficient to the aggrieved people and clamour for relief raged as vehemently as before and local legislations were undertaken (on the lines of the English Act of 1927) to pass suitable measures according to local needs especially in view of the general economic depression following the Great War which divergently affected the different provinces.

In course of time, experience gathered from the working of these statutes disclosed may defects and to remove them the present statute has been enacted. The present enactment is a great humane measure and it passes our comprehension why so much hue and cry should be raised over it. Its sole object is to give a proper direction to the practice of money-lending without hurting any particular individual or class.

The rate of interest fixed by it is neither insignificant nor uneconomic. Its whole object is to deal with both creditors and debtors fairly and squarely. It promises to secure a good return for the capitalists' money and at the same time holds out a protection to the aggrieved debtors from the oppression of their creditors. The only objectionable part of the statute is where it has enacted very rigorous laws about registration of professional money-lenders. Perhaps that has been done with a view to maintaining a vigilant

watch over the creditors' conduct. We think that the provisions about molestation, re-opening of transactions, scaling down of interests and a few penal provisions would have been quite sufficient to meet the exigencies of the circumstances, but unfortunately unnecessary rigour and complexity of situation have been introduced by providing for licensing of money-lenders. In this small book an attempt has been made to explain the real scope and object of the Act and to show what the various provisions of the Act really mean but in that how far we have succeed it is for the legal profession to judge and to give a verdict on. Every body, whether inside or outside legal circles, is now extremely anxious to know what the actual provisions of this Act are and we have tried our best to cater to that popular desire and have brought out this publication with great expedition. Perhaps the pages of this book will display the impress of a hurried work almost at every step and we crave the forgiveness of our indulgent readers for that defect.

In the preparation of this book and in carrying it through the press I have received much valuable assistance from a number of my esteemed advocate-friends and colleagues like Messrs. Sachindra Kumar Roy, Durgadas Roy, Biraj Mohan Roy and Amarendra Nath Roy Choudhury and I shall be failing in my duty if I do not express here my deep sense of gratitude towards all of them. I take this opportunity also to thank sincerely the authorities of the Bose Press and particularly Babus Bholanath Bose and Bibhuti Bhusan Chatterjee, but for whose untiring energy and unflinching devotion to duty, I would not have been able to place the book before the legal public so quickly.

Bhowanipore,
12th August, 1940.

A. C. GHOSE

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STATEMENT OF OBJECTS AND REASONS.

The Bill has been framed to supplement the provisions of the Bengal Money-lenders Act, 1933. It has been framed as a separate Act. The Act of 1933 does not apply to Calcutta within the limits of the Ordinary Original Jurisdiction of the High Court, on the other hand it applies to all loans made by Banks. As regards the latter point the additional sub-sec. (3) added to section 10 of the Act of 1933 by the Government of India (Adaptation of Indian Laws) Order, 1937, may be seen. The powers of the Provincial Legislature are to some extent limited by the terms of Articles 28 and 38 of List I of Schedule vii of the Government of India Act, 1935 ; and the limitation extends not only to prevent fresh legislation on the matters covered by those articles but also to prevent amendment of such parts of the Act of 1933, as relate to them. For this reason no attempt has been made to amend the Act of 1933, but a self-contained Bill has been framed, confined to such matters as it is believed are within the competence of the Provincial Legislature, and a general provision has been made in clause 42 of the Bill to exclude from the operation of the Act of 1933 any loan or any transaction connected with a loan which is subject to this Bill.

2. By the definition of "loan," certan lending transactions have been excluded from the operation of the Bill ; for example, loans to or by Governments, or by certain societies including co-operative societies and also loans by banks and Insurance concerns. Loan, however, includes loans in kind. A "lender" has been defined as any one who advances a loan, while a "money-lender" is defined so as to limit the term to the class of what may be called professional lenders. Chapters III, IV and V make provision for strict regulation of this class, requiring them to be licensed and to keep certain accounts and furnish certain information to borrowers, machinery being provided for the Courts to enforce compliance with, or, in some instances, to penalise non-compliance with those provisions.

3. Chapter VI contains provisions regulating rates of interest on all loans, including the abolition of compound interest, as such ; by the definition of "suits to which this Act applies," certain of these provisions are limited in their operations to loans and agreements made after the Act comes into force, the definition being similar to that in section 2, sub-section (3) of the Usurious Loans Act, 1918. Provision has also been made in this Chapter to limit the amount of charges and other incidental expenses in relation to loans.

4. Chapter VII contains a provision for orders for instalments in the case of all decrees in respect of loans, whether passed before or after the commencement of the Act. It has also pro-

visions similar to that in section 3 of the Usurious Loans Act, 1918, for re-opening transactions that offend against the provisions of the Act. There is provision for a borrower to move the Courts for taking accounts, and for the lender to convert any declaration so obtained into a decree on payment of the necessary Court-fee. There is provision similar to that in section 9 of the Bengal Money-lenders Act, 1933, for deposit of dues in Court. There is penal provision against any one who takes a document which does not state the true facts as to the transaction of loan to which it relates, and also against molestation of borrowers, and also against defaults in complying with the provisions of the Act.

Calcutta, The 14th July, 1938.

Musharruff Hossain,
Member-in-charge

NOTES ON CLAUSES.

Clause 1.—The date of commencement has been left to notification by Government because a considerable amount of rule-making (*vide* clause 41) requiring previous publication will be necessary to provide for the working of the Act.

Clause 2.—The definitions calling for comment have been dealt with in the Statement of Objects and Reasons.

Clauses 3 and 4.—These read with sub-clause (15) of clause 2 specify the courts which shall deal with licencing matters and regulate their procedure and provide for appeals. As the area in a sub-division does not always coincide with the jurisdiction of a Munsifi, and as it may also be desirable to limit jurisdiction to the more senior munsifs, it has been left for the Provincial Government to empower munsifs to hear matters in relation to sub-divisional or police-station licences.

Clauses 5 and 8.—It will not be possible for the licensing provisions of the Act to operate immediately it comes into force ; in clause 8 it is provided that these provisions shall operate from a date not less than six months after the commencement of the Act, and the licence year will then run accordingly from the date when these provisions begin to operate. It is necessary to leave time for the licensing machinery to be developed and for money-lenders to obtain their licences. These clauses have been framed accordingly.

Clauses 6, 7 and 9 to 11.—These contain provision for the machinery of Registration and licencing ; licencing is to be by areas, fees being charged as in the schedule. The Registrar may make such summary enquiry as he deems necessary, and in clause 11, sub-clause (4), is given certain powers of summoning witnesses, etc. He is also given powers where he finds that a money-lender has been operating without a licence or without a proper licence to enforce the taking out of such licence and of imposing a penalty.

Clause 12.—This ensures that the courts shall insist that a money-lender was duly licensed at the time he made the loan in respect of which he is suing and gives at the same time power to the Court to enforce payment of licence fee and opportunity to the money-lender to make good his default where such has occurred. Provision is also made that default in the year of the loan can only be remedied by payment of all previous outstandings, and there is also provision for a penalty. Sub-clause (5) has been framed with a view to stop a possible loop hole, *viz.*, avoidance of the requirements of the Act by assignment of the debt.

Clause 13.—This lays down the grounds for refusal of a licence ; an appeal to a competent Court as specified in chapter II is provided. Provision is made for removal by the Provincial Government of the disqualification on conviction of certain criminal offences which is provided for in sub-clause (1) (d).

Clauses 14 and 15. These give powers to Courts to suspend and cancel licences in certain circumstances, and also give rights of appeal against such orders, and make provision for circulation of information.

Clause 19.—This provides a penalty against concealment of facts in making application for a licence.

Clause 20.—This provides the minimum requirement as regards accounts to be kept by a money-lender, and that he shall furnish a statement in prescribed form as to a loan, a receipt for each payment, and take proper steps, when repayment is made in full.

Clause 21.—This provides for a yearly statement of accounts to be furnished by a money-lender, and for furnishing a statement when required by the borrower on payment of a fee.

Clause 23.—This provides the sanction for enforcement of the provisions of clauses 20 and 21.

Clause 24.—This exempts companies from the provisions of Chapter IV.

Clauses 25 and 26.—These relate to assignment of debts and make further provisions to ensure that the objects of the Act shall not be defeated by assignment, while at the same time giving protection to *bonafide* assignees. *Vide* also clause 12 (5).

Clause 27.—This clause (like several others in the present Bill) is based on similar provision made in the (English) Money-lenders Act, 1926 (4 and 5 Geo. c. 59, section 9), and limits the rights of a money-lender in insolvency and similar proceedings, postponing his right to more than five per cent. per annum interest till after the claims of other creditors have been satisfied.

Clause 28.—This repeats the "damdupat" provision in sections 4 and 6 of the Bengal Money-lenders Act, 1933. It applies to loans advanced whether before or after the commencement of the Act, and in respect of such loans, made before the commencement of the Bengal Money-lenders Act, 1933, as are also covered by the present Act, it removes the discretion given to the Courts in section 4 of that Act to make allowance where they were satisfied that the money-lender had reasonable grounds, for not enforcing his claim earlier. As that Act has already been in force for nearly five years, it is no longer necessary to provide for the exercise of any such discretion. The provision will apply

to suits whether instituted before or after the commencement of the Act.

Clause 29.—By this clause rates of interest have been limited to twenty-five and fifteen per cent. in the case of loans in kind and to twelve and eight per cent. in the case of other loans, for unsecured and secured loans, respectively.

Clause 30.—This abolishes compound interest and is based on similar provision in the (English) Money-lenders Act, 1926. Allowance is, however, made for recovery of simple interest on any instalment of interest in default, the rate being governed by the provisions of clause 29.

Clause 31.—This has been introduced to make clear how calculation is to be made of the equivalent rate of interest in respect of a loan in kind.

Clause 32.—This makes provision to limit charges and incidental expenses.

Clause 33.—This provides for orders of instalments to be made in respect of decrees relating to loans made before or after the Act, sub-clauses (2) has the effect of providing for an appeal.

Clause 34.—This repeats section 3 of the Usurious Loans Act with special reference to the provisions of this Bill. Sub-clause (2) repeats section 4 of that Act and applies the provisions of the Bill to certain insolvency proceedings.

Clause 35.—This makes provision for the borrower to obtain accounts through the Courts, and where any sum is found to be payable by the borrower, enables the lender to convert the declaration of the Court into a decree on payment of proper Court-fee. Provision is also made for the procedure to be followed and for the effect of the decision as *res judicata.*

Clauses 36 to 42.—Such of these clauses as call for comment have been referred to in the Statement of Objects and Reasons.

By order of the Governor,
H. D. Benjamin,
Secy. to the Govt. of Bengal.

REPORT OF THE SELECT COMMITTEE ON THE BENGAL MONEY-LENDERS BILL, 1938.

We, the members of the Select Committee to which the Bengal Money-Lenders Bill, 1938, was referred by a motion carried in the Bengal Legislative Assembly on the 5th August, 1938, have the honour to submit this our final report with the Bill embodying amendments recommended by us annexed. Matters recommended by us to be omitted have been printed in italics

and enclosed in square brackets and all new matters recommended to be inserted have been underlined.

2. The Bill was published before introduction in an extraordinary issue of the *Calcutta Gazette*, dated the 18th July, 1938.

3. The Committee met for the first time on the 11th August, 1938, and continued their sittings till the 13th August, 1938. But as the deliberations could not be finished by the 15th August, 1938, the date appointed in this behalf by the Assembly, the Chairman of the Committee presented an *interim* report to the House on the said 15th August, 1938, and on the requisition of the Committee the time for submission of the final report was extended by the Assembly till the 31st October, 1938. The Committee could not, however, finish their deliberations even within this extended period and continued their sittings till the 21st December, 1938, with the special permission of the Hon'ble Speaker.

4. The Bill has been substantially altered by our recommendation and we consider that it requires republication.

5. The changes made in the Bill, apart from mere formal and technical alterations, are as follows:—

CHAPTER I.

Clause 2—Sub-clauses (1), (4), (5), (6), (15), (16).—We have omitted the definitions of "Bank," "Company," "Cooperative Society," "Insurance Company," "Proceedings under this Act," "Provident Insurance Society" as we consider these unnecessary in view of alterations suggested by us in the body of the Bill.

We have considered it desirable to insert a definition of "borrower" in sub-clause *(1)* as this term occurs frequently in the Bill.

Sub-clause (2).—We have revised this, in consonance with the subsequent recommendations in the Bill.

Sub-clause (10).—We have modified the definition of "loan" by excluding advances without interest as we do not consider it desirable to treat such advances as "loan" for the purposes of this Act.

Sub-clause (10) (a).—In modifying this we intended to exclude all kinds of deposits of money or other property, not only in Post Office Savings Banks or with any Banking Company or Co-operative Society but at any place whatsoever, from the category of loan.

Sub-clause (10) (d) and (f).—We have omitted these as we did not consider it advisable to exclude loans to or by Banks, etc., or mercantile loans from the purview of this Act. Our

intention in making this amendment was also to control the Banks and mercantile loans and restrict flow of money from rural areas to Banking concerns and mercantile centres.

The explanations under this sub-clause have been omitted as unnecessary.

Sub-clause (19) (a).—The alterations here are consequential on our subsequent recommendation in the Bill.

CHAPTER II.

We found it desirable to have this chapter redrafted on account of material and extensive changes recommended by us. Our recommendation for elimination of different classes of licences for money-lenders as contemplated in the original Bill has necessitated a revised definition of Competent Courts. We have thought it preferable to let the Court of Small Causes, Calcutta, have original jurisdiction over proceedings under clause 14 of this Bill in relation to cases arising in Calcutta and have provided for appeal from its decisions to the High Court. The District Judge's was considered by us to be the most suitable Court for cases arising outside Calcutta either for disposal by itself or for transferring them to suitable subordinate courts for such disposal. We have provided for appeal from decisions of the Mufassil Courts in accordance with the provisions of the Civil Procedure Code. We have also extended the application of section 24 of the Code of Civil Procedure for cases coming under this Act.

CHAPTER III.

This chapter has, for similar reasons, been redrafted and the following alterations have been made in the clauses:—

Clause 5 has been omitted as unnecessary.

Clause 6 has been expanded and we have found it desirable to provide for appointment of Sub-Registrars of money-lenders in addition to the Provincial Registrar and Registrars.

The proviso has been inserted to avoid additional expenditure on account of these officers as far as is practicable.

Clause 8.—The alteration here has been necessitated by our recommendation in the subsequent clauses.

Clause 9.—We considered it undesirable to have different classifications for licences of money-lenders either on the basis of area or pecuniary limit of their business, as we thought that this might lead to complications and administrative inconvenience and have therefore provided for only one class of licence for the Province which should be renewable at the end of every three years.

Clause 9A is practically the original schedule to the Bill modified in consequence of our recommendation in clause 9. We consider a fee of Rs. 15 adequate for a triennial licence. In the proviso we have considered it advisable to allow the Provincial Government a discretionary power in reducing licence fees in appropriate cases or classes of cases.

Clauses 10, 11 and 12.—The amendments here are of a consequential nature. We have made it incumbent on the Court to penalise the money-lender who has not taken a licence instead of leaving it to its discretion.

Clauses 12A and 12B.—In these new clauses we have provided specifically for the disqualifications for holding a licence and also the method for proving such disqualifications. Our object here was to clarify the intention and simplify the procedure.

Clause 13.—This clause has been recast and expanded to make the provision for refusal of licence unambiguous. We have also made more exhaustive provision for appeals and revisions against orders of such refusal. We have considered it desirable to leave the procedure with regard to these matters to be prescribed by rules.

Clauses 13A and 13B.—These new clauses have been found necessary as we thought that the Sub-Registrars should have the power to cancel licences and as it would be impossible for them to function properly without requisite powers for compelling the attendance of witnesses.

Clause 14.—We did not think that any borrower, placed as they are under the clutches of the money-lenders, would make any frivolous complaints. We did not therefore consider it proper to put any obstacle on their path in making applications against undesirable money-lenders and have therefore omitted the restrictions.

Clause 15.—This clause has been recast and expanded. This provision about cancellation of licences including the procedure, extent of penalty and appeals have been clearly provided in the modified clause.

Clause 17 has been omitted as unnecessary.

CHAPTER IV.

Clause 20.—(1) We considered it essential that all accounts of money-lenders carrying on business in Bengal including receipts should be kept in the language of the province and have amended the clause accordingly.

(2) We have slightly amended this sub-clause providing for delivery of statements or receipts as soon as a loan is advanced

or a payment is made, to avoid any possible difference which may be caused by lapse of time.

Clause 21—**Sub-clause** (1).—We have recommended that the statement of accounts must be submitted in Bengali in the spirit of earlier recommendations.

Sub-clause (1) (a) (a).—This is intended to cover cases of continuous transactions.

Sub-clause (2).—We did not consider it proper for the lender to charge any fees from the borrower for supplying him with statements which the latter can reasonably demand. The proviso to this has been inserted as we thought this would avoid too frequent demands for statements.

Sub-clause (3) has been amended by omission of "fees" and also by providing that the borrower should get copies only of documents evidencing the loan but not of any other document or security connected with it. Here again a proviso has been added to put a check on unnecessary demands.

Sub-clause (4).—We have thought fit for the convenience of the people of the province to define "year" as the Bengali year.

Clause 24.—We did not consider it expedient or desirable to give the Provincial Government any power as contemplated by the original clause and have therefore omitted it. Our intention was to bring all classes of lenders or money-lenders under uniform treatment.

CHAPTER V.

Clause 25.—We have considered the provision for indemnity in sub-clause (*1*) as an inadequate penalty against the defaulter and have provided for imprisonment and fine as more appropriate. In the new sub-clause (3) we have made the meaning of "assignment" clear.

Clause 26.—We have inserted "lenders" in this clause for obvious reasons.

Clause *27* has been omitted as unnecessary.

CHAPTER VI.

Clauses 28, 29 and 30.—These clauses have been redrafted and our recommendations in this connection have been embodied in the new clauses 28 and 29. In these new clauses we have considered it desirable to provide that the lender should on no account recover more than the original loan as interest. We have further provided that when part of the principal has been paid, the interest on the balance should never exceed the amount of such unrealised balance. We have recommended total abolition

of compound interest and have found it extremely desirable to reduce the maximum rate of interest recoverable to 8 per cent. per annum for secured and 10 per cent. per annum for unsecured loans irrespective of whether such interest accrues before or after the commencement of this Act. We have further thought it desirable not to allow any interest after a decree is passed in any suit to which this Act applies, as our intention was to avoid interest on any interest on any form whatsoever.

Clause 31.—The words "of interest" have been omitted to include assessment of principal as well.

Clause 32.—We have omitted the proviso as this might lead to undesirable results and may be an instrument of unreasonable exactions by the money-lenders, who should, in our opinion, be prepared to incur all such reasonable expenditure when he lends money on interest.

CHAPTER VII

Clause 33.—Our recommendations regarding instalments have been elaborately embodied in the redraft of this clause. In giving detailed directions our intention was to give the debtors all reasonable facilities in repaying their debt.

Clause 34.—This clause has been expanded and redrafted giving the Courts more power than was originally intended. We have thought it expedient to permit reopening of all transactions in connection with money-lending unreasonably closed or adjusted for a period of twelve years previous to the passing of this Act, as in our view a period of three years as originally provided would not meet the ends of justice.

We have, however, given the Courts power to re-open decrees only when passed between the 1st January, 1939 and the date when this Bill passes into law and to order refund in cases of payments made in excess of the rates provided in this Bill when such payments are made after the 1st January, 1939. Details of procedure in this connection which cover executions, appeals and review have also been specifically provided for to avoid any possible confusion.

Clause 34A.—We have in this new clause provided for exemption of judgment-debtors from arrest and detention in prison as we thought these were undesirable tools in the hands of oppressive money-lenders.

Clause 35—**Sub-clause** (1).—We have provided the fee in the Bill itself instead of leaving it to be prescribed by rules, over which the Legislature might not have any say.

Sub-clause (3).—This sub-clause has been omitted as we thought it might tempt the money-lender in bringing premature suits.

Clause 36.—In this clause we have omitted the provision for "prescribed fee" for depositing any money tendered to but refused by the lender. The charging of any fee in such cases is bound to result in hardship. The other amendments are of a consequential nature.

Clause 37—**Sub-clause** (1).—We have included "bond" in this sub-clause as this is one of the commonest kind of instruments which form the basis of loans.

Sub-clause (2).—We thought it desirable to introduce the element of "intention" as otherwise *bona fide* mistakes might come under the mischief of this clause. For deliberate misrepresentations we have thought it fit to make the section more stringent and have provided for the penalty of imprisonment in addition to fine.

Clause 37A.—This new clause has been provided as a safeguard against default in passing of the full consideration on a registered document. As the parties would at some stage appear before a registering officer, there can be no difficulty if the consideration passes in his presence.

Clause 37B.—We thought that the provisions of Chapters III and IV would lead to various complications if applied to "commercial loans" as we have defined, and have therefore specifically excluded the operation of those chapters on such loans.

Clause 38.—We considered the original provisions regarding penalty inadequate and have raised both fine and imprisonment to what seemed to us to be justified by the nature of the offence.

Clause 39—**Sub-clause** (1) has been slightly modified. We did not consider it fair that every adult coparcener should be punishable and have confined the punishment to the Manager only who would be mainly responsible for the mischief. We also thought it expedient to provide for punishment of those only who "knowingly or wilfully" commit or permit any default or contravention. This is intended to disregard *bona fide* and unintentional mistakes.

Sub-clauses (2) and (3).—These new sub-clauses are intended as safeguards against frivolous complaints.

Sub-clause (4) has been introduced to distinguish offences punishable under this clause from ordinary offences under the Indian Penal Code.

Clause 41.—The amendments in this clause are mostly of a consequential nature and have been made to conform to the altered provisions in the Bill.

THE SCHEDULE.

The original schedule has been omitted in consequence of the amendment in clause 9 and insertion of clause 9A. In the

new schedule we have specifically mentioned the offences which in our opinion are sufficient to disqualify a money-lender from holding a licence, in terms of the new clause 12A of the Bill.

*MUSHARRUF HOSSAIN.
Member-in-charge.

*ABDUL BARI.
*MIRZA ABDUL HAFIZ.
*C. MORGAN.
*SASHI KANTA ACHARYYA CHOWDHURY.
*JOGESH CHANDRA SEN.
*D. P. KHAITAN.
*L. M. CROSFIELD.
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*S. N. BISWAS.
*NALINAKSHA SANYAL.
*KSHETRA NATH SINGHA
*ABDUL LATIF BISWAS.
*MD. ISRAIL.
*MD. MOZAMMEL HUQ.
*AFTAB HOSAIN JOARDAR.
*FAZLUR RAHMAN.
*SYED MD. AFZAL.
*AHMED HOSSAIN.
*SHAH SYED GOLAM SARWAR HOSSAINI.
*RAJIBUDDIN TARAFDAR.
*A. C. KUMAR.
*SYED ABDUL MAJID.
*ABDULLA-AL MAHMOOD.
*ABDUL HAKIM.
*A. M. A. ZAMAN.
PULIN BEHARY MULLICK.
SHAH ABDUR RAUF.
ZAHUR AHMED CHOUDHURY.

K. ALI AFZAL.
Secretary to the Bengal Legislative Assembly.

***Signed subject to a minute of dissent.**

Note.—(1) No minutes of dessent had been received from the Hon'ble Nawab Musharruff Hossain, Khan Bahadur, Mr. A. C. Kumar, Mr. Syed Abdul Majid, Mr Abdulla-al Mahmood, Maulvi Abdul Hakim and Mr. A. M. A. Zaman up to the time of printing the report.

(2) Signature of the Hon'ble Mr. Nalini Ranjan Sarkar, the Hon'ble Mr. H. S. Suhrawardy and Mr. Abdul Hashim had not been received up to the time of printing the report.

(3) Mr. R. H. Ferguson has since resigned.

Minute of dissent by Maulvi Abdul Bari, M.L.A.

Clause 20.—The proviso to write the cash book, the ledger and the receipt book in Bengali will seriously handicap trade and business and entail serious hardship to the non-Bengali classes such as the Marwaris, the Englishmen and the Urdu-speaking Mussalmans coming from Western India. Every money-lender ought to have the individual liberty of maintaining his records in the language in which he speaks. The proviso to supply copy in Bengali to the borrower ought to be accepted as sufficient safeguard of the interest of the borrower.

The provisions of clause 20(*1*) is self-contradictory and inconsistent with what follows in clause 21(*1*) and (*2*).

Clause 29.—There should be no difference and distinction between loans in kind and loans in cash so far as interest is concerned. The rate of interest whether for loan in kind and in cash should be uniform. If the difference as proposed be maintained, the borrower will be left to the mercy of his merciless creditors to take higher interest as every loan will be shown as a loan in kind.

Clause 34.—The proviso to clause 34 nullifies the effect of the substantial clause 34 and makes nugatory the provisions of clauses 28 and 29. This proviso to clause 34 cuts at the very root of the whole Bill and runs counter to the wishes of the majority of the members of the Assembly.

To extend the operations of this Act to the Co-operative Societies would ring the death-bell of the Co-operative Movement of the province. Apart from commercial business the agriculturists for whose benefit primarily this Act is being enacted will be seriously affected The sources of money are being already dried up in the mufassil and the winding up of the Co-operative Movement would add to the miseries of the people when they stand urgently in need of money. To bring the Post Office Savings-Bank, Bank or Company within the purview of this Act, would in the long run, bring about the ruin of the country because banking and business are really the signs of the prosperity and growth of a country. A distinction ought to be drawn between agricultural and commercial loans.

Minute of dissent by Mr. Mirza Abdul Hafiz, M.L.A.

. . . . I reserve the right of moving further amendments in the House as I think right and proper for the good of the indebted province.

Sub-clause 2(10)(f).—By the deletion of this sub-clause a loan advanced to be used by the borrower for the purpose of any business or concern relating to trade, commerce and industry has been thought advisable not to be excluded from the purview

of this Act in apprehension that if it is excluded then almost every money-lender in order to avoid the stringency of the Money-Lenders Act would persuade rather compel every borrower to give a bond with the stipulation of business concern for whatever purposes it may be at the threatening of not advancing money at all. It is not unnatural and improbable that some money-lenders may not adopt the same obnoxious course to avoid the provision of the Act on the plea of trade, commerce and industry but at the same time, I fear and perhaps rightly fear, that for such inclusion and control of mercantile loans the business of the province cannot but suffer which would be most detrimental to the cause of economical advancement of the country. According to me the gain under the present circumstances which is expected by control of mercantile loans to suppress some obnoxious tactics probably adopted by some law-avoiding money-lenders would be dwindled into naught in comparison with the loss that is apprehended in the business world at large. Of course it may be to a great extent rightly said that the business of the province has already been suffering from heavy indebtedness and if it is brought under the operation of this Act it may be released from the grip of such debt within a very few years after which a steady progress may set in motion in the field of business and many members of the Select Committee had that view in their minds to amend the clause. But still I think that with some restrictions and limitations so that the lenders may be confronted with sufficient checks to adopt such heinous tactics to avoid the Act, *bona fide* mercantile loans for the purposes of trade, commerce and industry should be excluded from the operation of this Act.

Joint minute of dissent by Mr. G. Morgan, M.L.A., Maharaja Sashi Kanta Acharyya Chowdhury, of Muktagacha, M.L.A., Rai Bahadur Jogesh Chandra Sen, M.L.A., Mr. D. P. Khaitan, M.L.A., and Mr. L. M. Crosfield, M.L.A.

We are of opinion that the Bill is *ultra vires* of the Provincial Legislature in, *inter alia,* so far as it affects—

(*a*) Promissory Notes;

(*b*) Corporations coming under Article 33 of List I of Schedule VII to the Government of India Act;

(*c*) Banking coming under Article 38 of List I of Schedule VII to the Government of India Act;

(*d*) Acts passed by the Central Legislature, *e.g.,* Civil Procedure Code, Contract Act, Transfer of Property Act, etc.

We do not agree with several provisions of the Bill as amended by the Select Committee, *inter alia*—

(*a*) the definition of "Loan", particularly as commercial loans, dealings by Banks, etc., and Promissory Notes are not exempted from the operation of the Bill;

(*b*) the definitions of "money-lender" and "money-lending business", as the same are too wide and should at least be brought into conformity with the British Law on the subject;

(*c*) the definition of "suit to which this Act applies" in so far as it is made retrospective in effect;

(*d*) clauses 20 and 21 enforcing that the books of accounts are to be kept and statements are to be delivered in the Bengali language only;

(*e*) extending the rule of damdupat to apply to interest already paid or included in any decree;

(*f*) the provisions of clause 28(*1*)(*b*);

(*g*) the maximum rates of interest provided for particularly in so far as they are given retrospective effect;

(*h*) the application of the maximum rates of interest to commercial loans;

(*i*) clause 29 disallowing any interest on the decretal amount;

(*j*) the deletion of the proviso to clause 32;

(*k*) the provisions of clause 33;

(*l*) the provisions of clause 34 seeking to extend the provisions of section 3 of the Usurious Loans Act, 1918;

(*m*) the provisions of clause 34A overriding the provisions of the Civil Procedure Code;

(*n*) the provisions of clause 36(*3*) in so far as it enables the borrower to earmark a payment to be on account of principal while interest is due;

(*o*) the omission of Chapter V from clause 37B, although the Select Committee decided to include that chapter in clause 37B and such decision was never reversed.

We reserve to ourselves the right to move or support any amendments that we consider to be proper.

Minute of dissent by Mr. Monoranjan Banerjee, M.L.A.

Before we proceed to go into the details of our dissent we think we should place on record our disappointment at the failure of our attempts to improve the Bill. The object of the Bill, though

not expressly stated, was evidently to provide for strict regulation of the professional money-lenders. So far as that object was concerned we had no difference of opinion. But . . . . . . the majority members of the Committee . . . in their over-jealousness to give relief to the debtors proposed and carried such measures as are likely to cut the root of future money-lending business. There is no gainsaying that the application of the Bengal Agricultural Debtors Act of 1935, while affording some relief to the debtors in so far as their existing debts are concerned, has resulted in drying up all the channels of credit-supply in the mofussil in general and in the rural area in particular. However, the said Act being a temporary measure its effects also were to be temporary. But the Money-Lenders Bill, if passed into law, will be a permanent statute and we expected that the experience of the peoples' representatives in the Select Committee would influence them to so provide in the Bill that the dried channels of credit-supply might be rehabilitated. Unfortunately, the majority . . did not look at the Bill from that point of view. They went further than the authors of the Bengal Agricultural Debtors Act and acted upon an idea that there was no more necessity of any person for incurring any debt. The rates of interest for future loans were not matters of much dispute. There was a general agreement in respect of the rates of interest. But the provisions of clauses 33 and 34 which relate to realisation of debts have been so laid down that every money-lender, whether an individual or a corporate body, will think thrice before lending any money to anybody for any purpose, whether on credit or against security. Where we expected that our experience would influence us to ease the realisation of future debts, the measures that have passed through majority votes have further tightened it. If these measures are passed as law, the prospective borrowers of every section of the society, in whose interest such law is purported to be made, will resent it more than the money-lenders. We raised this alarm in the course of our debate but our voice was whittled down.

Then as regards the realisation of the existing debts, we were in favour of giving the debtors as much relief as was reasonably possible in addition to the relief contemplated by the Bengal Agricultural Debtors Act ; but some such provisions have been carried . . . . . as, when passed into law, may in many cases result in serious loss to innocent money-lenders and in dislocation of trade and industry ; even a popular money-lender, who lent the money on small rates of interest within the limits, prescribed by the Bill and whose debtor also was gladly paying the interest, may suddenly find his or her capital on whose interest he or she had been living with his or her children, vanishing all on a sudden, his or her offence being that the

debtor was allowed to keep the loan unrepaid for a long time to his own benefit because it was carrying small rates of interest.

Reserving our further comments on the outlook with which the majority of the members of the Committee approached the Bill for a future date and at the proper place, we now note below our dissent from several provisions of the Bill as have emerged out of the Select Committee, *inter alia*,—

1. **Clause** 2.—(*a*) The definitions contained in sub-clauses (*1*), (*4*) and (*5*) should have been retained.

(*b*) Sub-clause (*10*) (*f*) which exempted commercial loans from the operation of the Bill should have been retained.

(*c*) Explanations (*1*), (*2*) and (*3*) should have been retained.

(*d*) The definition of "money-lending business" as con-contained in sub-clause (*12*) should have been more clear and definite, so that a friend lending money to a friend for short-time accommodation might not be scared away.

(*e*) The words "before or" in sub-clause (*19*) (*b*) should not have been inserted.

2. **Clause** 20.—The money-lenders who transact business in Calcutta and mofussil towns should have been allowed to keep their accounts in Bengali or English.

3. **Clause** 21.—Statements by the abovementioned money-lenders should have been allowed to be delivered in English or Bengali as the borrower would desire.

4. **Chapter** IV.—Government should have been vested with the power to exempt certain classes of money-lenders from the operations of the provisions of clauses 20 and 23, such as agriculturists who lend money on usufructuary mortgage and widows and orphans whose money-lending business does not exceed three hundred rupees.

5. **Clause** 25.—The punishment should have been less severe.

6. **Clause** 28.—(*a*) Sub-clauses (*a*) and (*b*) should have exempted loans carrying interest within the limits prescribed in this clause.

(*b*) In sub-clause (*c*) (*ii*) there should have been differentiation between loans secured against immovable property and loans against liquid securities.

7. **Clause** 29.—Such a clause should not have found place in the Bill.

8. **Clause** 32.—The proviso should have been retained.

9. **Clause** 33.—(*a*) Granting of instalments in decrees

should not have been made obligatory by substituting the word "shall" in the place of "may" of the original Bill.

(*b*) Stopping payment of interest on instalments in mortgage decrees and allowing interest at the rate of three per cent. only on instalment in default could not be supported.

(*c*) At the time of the preliminary decree in a mortage suit the Court ordinarily grants some time for payment before the final decree. The Court should have been given wider discretion, but instalments for ten years is not only excessive but out of proportion.

(*d*) In simple money-decrees, the Court's power to give instalments over a period up to twenty years and the mandate upon the Court to order that in default of payment of one instalment, that instalment only and not the whole amount due shall be recoverable and that too without interest were unsupportable.

10. **Clause** 34.—(*a*) Sub-clause (*a*) was unsupportable.

(*b*) Sub-clause (*d*) should have excluded commercial loans from its operation.

(*c*) Re-opening of any agreement or adjustment within a period of twelve years was not supportable.

(*d*) No provision should have been made for refund on interest paid at the rates allowed by law.

11. **Clause** 36.—The language of sub-clause (3) should have been clear enough to debar a borrower from earmarking a deposit towards payment of the principal or any part thereof before paying the entire amount of interest due.

12. **Clause** 37B.—Chapter V should have been included in sub-clause (1).

13. **Clause** 39.—The word "Hindu" in sub-clause (*b*) was put unnecessarily.

We reserve the right to move or support any amendment to any of the provisions of the Bill, that we consider fit.

We cannot conclude without observing that some provisions of the Bill were *ultra vires* of the Provincial Legislature . . .

Joint minute of dissent by Mr. J. C. Gupta, M.L.A., and Mr. S. N. Biswas, M.L.A.

We are of opinion that the Bill as it has emerged out of the Select Committee will fail in its object. The Bill was intended to give protection to helpless borrowers against excessive rate of interest and harassment at the hands of professional money-lenders. But the amendments carried by a majority of votes, we are afraid, will result in the destruction of credit supply altogether,

particularly in the rural areas, and will also result in dislocation in trade and industry in the Province.

Some of the members . . . . openly stated more than once during discussion that we need not be concerned about credit facilities and that the people of Bengal needed no loans or credit-supply in future. It was further said that those who had engaged themselves in money-lending business in the past were all pests of the society and should be wiped out of existence. Owing to prevalence of such sentiments our attempts to ensure the laudable object of the Bill and to improve the Bill failed.

Reserving our further comments on the outlook with which the majority of the members of the Committee approached the Bill for a future date and at the proper place, we now note below our dissent from several provisions of the Bill as have emerged out of the Select Committee, *inter alia*—

1. **Clause** 2.—(*a*) The definitions contained in sub-clauses (1), (4) and (5) should have been retained.

(*b*) Sub-clause (10) (*f*) which exempted commercial loans from the operation of the Bill should have been retained.

(*c*) Explanations (1), (2) and (3) should have been retained.

(*d*) The definition of "money-lending business" as contained in sub-clause (12) should have been more clear and definite, so that a friend lending money to a friend for short-time accommodation might not be scared away.

(*e*) The words "before or" in sub-clause (19)(b) should not have been inserted.

2. **Clause** 20.—The money-lenders who transact business in Calcutta and mofussil towns should have been allowed to keep their accounts in Bengali or English.

3. **Clause** 21.—Statements by the abovementioned money-lenders should have been allowed to be delivered in English or Bengali as the borrower would desire.

4. **Chapter** IV.—Government should have been vested with the power to exempt certain classes of money-lenders from the operations of the provisions of clauses 20 and 23, such as agriculturists who lend money on usufructuary mortgage and widows and orphans whose money-lending business does not exceed three hundred rupees.

5. **Clause** 25.—The punishment should have been less severe:

6. **Clause** 28.—(a) Sub-clauses (*a*) and (*b*) should have exempted loans carrying interest within the limits prescribed in this clause.

(*b*) In sub-clause (c) (*ii*) there should have been differentiation between loans secured against immoveable property and loans against liquid securities.

7. **Clause** 29.—Such a clause should not have found place in the Bill.

8. **Clause** 32.—The proviso should have been retained.

9. **Clause** 33.—(*a*) Granting of instalments in decrees should not have been made obligatory by substituting the word "shall" in the place of "may" of the original Bill.

(*b*) Stopping payment of interest on instalments in mortgage decree and allowing interest at the rate of three per cent. only on instalment in default could not be supported.

(*c*) At the time of the preliminary decree in a mortgage suit the Court ordinarily grants some time for payment before the final decree. The Court should have been given wider discretion to extend that time, but instalments covering six months were not supportable.

(*d*) In simple money-decrees, the Court's power to give instalments over a period up to twenty years and the mandate upon the court to order that in default of payment of one instalment, that instalment only and not the whole amount due shall be recoverable were unsupportable.

10. **Clause** 34.—(*a*) Sub-clause (*a*) was unsupportable.

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12. **Clause** 37B.—Chapter V should have been included in sub-clause (1).

13. **Clause** 39.—The word "Hindu" in sub-clause (*b*) was put unnecessarily.

We reserve the right to move or support any amendment to any of the provisions of the Bill, that we consider fit.

We cannot conclude without observing that some provisions of the Bill were *ultra vires* of the Provincial Legislature . . .

Minute of dissent by Dr. Nalinaksha Sanyal, M.L.A.

I place on record my emphatic protest against the form in which the Select Committee's Report has been drafted whereby certain supposed convention has been invoked to hide . . . . the real character of the Report, and I sign the Report subject to the following note of dissent. I do this more as a student of Economics than as a member of a political Party.

The Bill as it has emerged from the Select Committee fails to ensure the maintenance of suitable credit machineries for different classes of the population, particularly, for the agriculturists, and if passed into law, is likely to cause great hardship to the masses, as it is bound to dry up very largely the present sources of credit.

The following points in particular should receive serious consideration:—

1. The majority of members of the Select Committee have, in my opinion, failed to appreciate the real purpose of a comprehensive legislation relating to money-lenders and the business of money-lending. They have approached the questions mainly from the point of view of an emergency measure calculated to scale down the burden of present indebtedness without due regard to the requirements of rural credit and other credit agencies.

2. The Report seeks to apply the same set of measures for regulating all classes of credit transactions, agricultural, industrial and commercial, and problems of each of which are widely divergent and demand separate examination.

3. The dealings of Joint Stock Banks, Insurance Companies, Building Societies, etc., and of Registered Corporations have been subjected to the same restrictive conditions as those of village money-lenders. . . . . If the Bill in its present form is passed into law the development of sound banking in the country will be seriously jeopardised and probably the structure of the entire money market will be shattered ; and those in need of credit for industrial, commercial and agricultural pursuits will be the greatest sufferers.

4. So long as complete natonalisation of all institutions of production and State ownership and management of industrial, commercial, transport and credit undertakings are not achieved, the function of capital as a factor of production should not be underestimated and under present economic order the subjective as well as objective conditions of accumulation of capital in the society cannot be ignored.

5. At a time when Bengal is on the threshold of an economic reconstruction involving the extension of industrial and commercial facilities, it will be suicidal to indulge in measures which may

frighten away what little capital has just begun to be attracted. This will set-back the little progress attained and will probably increase unemployment.

6. The Report infringes some of the fundamental principles of legislation, e.g., *nova constitutio futuris forman imponere debet non praeteritis,* a new law ought to be prospective, not retrospective in its operations.

7. It is apprehended that some of the recommendations made in this Report are *ultra* vires of the Provincial Legislature, particularly, the provisions relating to Banks, Corporations and Negotiable Instruments. Certain subjects of concurrent Legislative List such as Civil Procedure, Transfer of Property, Contracts, Evidence, etc., are also affected.

A legislation of this character should not be proceeded with and public money spent in that connection before taking proper legal advice on such matters.

I reserve my right to move suitable amendments to the Bill in proper time and without prejudice to such a right I propose that the following changes in the various clauses should be made :—

Clause 1, **Sub-clause** (3).—Government should be empowered to bring into force different provisions of the Bill, particularly those mentioned in Chapters 3 and 4 on separate dates as may be found practicable.

Clause 2, **Sub-clause** (10) (f).—This excluding clause defining commercial transactions or any modified from thereof should be retained.

Clause 8.—Add the words "or to the firm, Corporation or joint-family of which he is a member".

Clause 14—It is unfair and impracticable to insist that all money-lenders in Bengal should write out their accounts in Bengali, much though this would be welcome. It should suffice, if money-lenders are required to supply to the borrower statements in Bengali or in the language of the borrower. This applies also to clause 21.

Clause 24, **Sub-clause** (10) (f).—This should be reinstated.

Clause 25, **Sub-clause** (2).—The punishment provided is much too severe.

Clause 28.—This should be thoroughly recast along following lines :—

(*i*) clause 28 (*a*) may be applied to loans used for or in connection with agriculture, but should not apply to commercial loans, building societies' transactions and long term debentures of industrial concerns.

(ii) clause 28 (c) should have a definite date stated, say, 1st January 1939, for the applicability of the new rates and the rates of interest should be such as may be recommended by the Reserve Bank of India from time to time in view of the state of the money market, world economic conditions and the rates prevailing in other Indian provinces, particularly in the adjoining provinces. A differentiation between loan against mortgages of immovable properties and secured loans against movable or readily realisable securities may be made if a lower maximum for the latter group is considered desirable.

Clause 29 should be deleted.

Clause 32.—Proviso should be reinstated.

Clause 33 should be entirely recast as it contains many absurd, unpractical and utterly unfair provisions.

Clause 34.—The provision for re-opening past transactions and for refunding excess payment should be left entirely in the discretion of the Court where a *prima facie* case of unconscionable and substantially unfair character of a loan has been made out.

Clause 37.—The receipt of blank transfer of shares and such instruments in commercial transactions as securities for loans should not be made illegal and failure to comply with the provisions of clause 37 (1) should not entail such stringent punishment as in clause 37 (3).

Minute of dissent by Babu Kshetra Nath Singha, M.L.A.

1. I like to dissent in the provisions to include the commercial transactions within the purview of the Bill. My opinion is this that the world is fast approaching to economic revolution. While other countries are adopting a monopolistic principle and trying to be self-sufficient in their trade, industry and commerce, Bengal with her huge raw materials, should not lag behind and put obstructions to the free growth of her infant trade, industry and commerce and be at the kind mercy of foreign competition to the utter ruin and devastation of her home products.

2. In Clause 36 (3) interest shall cease from the date of deposit to save the lender from harassment and uncertainty of date of service.

Minute of dissent by Maulvi Abdul Latiff Biswass, M.L.A.

Clause 8.—In this clause provision has been made
effect that no money-lender shall carry on the busine
lending unless he holds an effective licence after su
less than six months after the commencement of this

Provincial Government shall, by notification in the *Official Gazette,* appoint in this behalf. So the virtual effect of this provision is that Government will be at liberty not to appoint any such date for any length of time and the only restriction put upon the Government is that the Government is not entitled to fix up date within six months after the commencement of this Act. And if the Government desires it may fix up such date after two, three, six or twelve years or more. We have seen in our practical experience that some good laws or Acts have been proved to be ineffective and dead letters owing to the fact that no restrictions was placed upon the Government as to the time within which those laws or Acts were to be put in force. It may so happen that many forces strong in their nature may work in such a way as to prevent the Government from putting these provisions into effect if no time limit is provided for the purpose. That is why I am of opinion that without giving the Government long rope it should be provided that the Government must enforce these provisions within a particular time, so that the provision, very salutary in effect, may not prove fruitless or dead letter for want of such restriction. So it is my proposal that the words "after such date not less than six months after the commencement of this Act" be substituted by the words "after such date not more than one year after the commencement of this Act".

Joint minute of dissent by Maulvi Md. Israil, M.L.A., Maulvi Mohammed Mozammel Huq, M.L.A., Maulvi Aftab Hossain Joardar, M.L.A., Mr. Fazlur Rahman, M.L.A., (Mymensingh), Khan Sahib Maulvi Syed Md. Afzal, M.L.A., Mr. Ahmed Hossain, M.L.A., Mr. Shah Syed Golam Sarwar Hossaini, M.L.A., and Maulvi Kajibuddin Tarafdar, M.L.A.

The rate of interest specified in clause 28, sub-clause (*c*) (*i*) and (*ii*) should, in our opinion, be 9 per cent. and 6 per cent. per annum in place of the rates proposed in the Bill, because the proposed rates of interest appear to us to be excessive in view of the impoverished condition of the debtors due to economic depression and other natural calamities that have befallen them.

Table of Cases.

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The following Notification appeared in the Extraordinary Issue of the Calcutta Gazette, dated the 3rd August, 1940.

NOTIFICATION

No. 2674J.—3rd August, 1940—In exercise of the power conferred by Sub-section (3) of section 1 of the Bengal Money-Lenders Act, 1940 (Bengal Act X of 1940) the Governor is pleased to appoint the 1st September, 1940 as the date on which the said Act shall come into force.

By order of the Governor,

A. L. BLANK,

Secy. to the Govt. of Bengal.

M

THE
BENGAL MONEY-LENDERS ACT, 1940.

Being Bengal Act X of 1940.

(Passed by the Bengal Legislature)

(Assent of the Governor-General was first published in the *Calcutta Gazette* of the 1st August, 1940*)

An Act further to regulate transactions of money-lending in Bengal

WHEREAS it is expedient to make further and better provision for the control of money-lenders and for the regulation and control of money-lending:

It is hereby enacted as follows:—

The Pre-amble : This piece of legislation as appearing from the Pre-amble itself has been undertaken with the avowed object of making *further* and *better* provision for the regulation and control of money-lending. The word "further" indicates that other provisions have already been made in other enactments [e.g. the Usurious Loans Act (Act X of 1918) ; Bengal Money-Lenders Act, Beng. Act VII of 1933], to control money-lending, but *additional* provisions have been made herein to *supplement* the existing law on the subject, particularly, the Bengal Money-Lenders Act, 1933, inasmuch as the latter has been found to be insufficient to effectively control the money-lenders. The additional provisions of this Act, in the opinion of the Legislature, will more effectively regulate and control money-lending in this Province and therefore they are called *better* than the provisions already in existence on the matter. It may be mentioned here that under section 45 of this Act, loans which are amenable to this Act and the transactions connected with such loans have been placed altogether outside the scope of the Bengal Money-Lenders Act, 1933.

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* Notification No. 798L.—27th July, 1940.—The following Act of the Bengal Legislature having been assented to in His Majesty's name by the Governor-General, is hereby published for general information—*Calcutta Gazette*, dated 1st August, 1940, Pt. III, p. 27.

The Pre-amble, supplying a key to the object of the legislation, may render some assistance in construing the different provisions of the Act; it may furnish a useful guide as to the meaning or scope of the different sections contained in it, *Satish Chandra* v. *Delanney,* 20 C.W.N. 1158=34 I.C. 450; *Manilal* v. *Improvement Trustees,* 45 Cal. 343=27 C.L.J. 1=11 C.W.N. 1, F.B.; read also Maxwell, 8th Edn., pp. 40-41; but this is possible only when some doubt or ambiguity attaches to the meaning of the words used in the Act, [*Powell* v. *Kempton Park Racecourse Co.,* (1899) A.C. 143=68 L.J.Q.B. 392], because, as very often re-iterated in our Courts, a Pre-amble can never cut down or restrict the *express* provisions in a statute [*Sutton* v. *Sutton,* 22 Ch.D. 511 (520); *Q. E.* v. *Indrajit,* 11 All. 262], or extend their natural and inevitable meaning [*Kadir Baksh* v. *Bhawani Prasad,* 14 All. 145 (154)]. The Pre-amble does not govern the clear expressions in the enacting part, *Keshav Panda* v. *Bhobani Panda,* 18 C.L.J. 187, and can never be made use of to control the clear provisions of an enactment, *Nepra* v. *Sajer Pramanik,* A.I.R. 1927 Cal. 763=103 I.C. 662, and this is so, because, as Holt C. J. has put it in *Mills* v. *Wilkins,* (1703) Holt K. B. 662, a Pre-amble is really no part of the statute; consult Halsbury's *Laws of England,* Vol. xxvii, p. 117.

How to interpret the Pre-amble.

The sole object of the Act being to control and regulate money-lending its provisions cannot apply unless the case is between a *lender* and a *borrower*. Unless the transaction in dispute and involved in the suit, is a *loan,* and the parties to the suit are lenders and borrowers, no question of the applicability of this Act at all arises. It is not enough to attract the operation of the Act that the relationship of a decree-holder or of a judgment-creditor and a judgment-debtor subsists between the parties to the suit, Comp. *Gulab Chand* v. *Bruel,* 1938 N.L.J., 9. The mere fact that the parties stand in the relationship of creditors and debtors also will not make this Act operative.

Cases to which the Act is not attracted.

Construction of the Act : The Act is undoubtedly a remedial measure; therefore, in construing its provisions, the Court should generally follow the rules that are ordinarily applied in the construction of other remedial statutes [Comp. *Sarju Prasad* v. *Gauri Shankar,* 4 Luck, 1=A.I.R. 1928 Oudh, 396=115 I.C. 841 (F.B.)] and one of such rules is that the Court should not put a very restricted construction on its language as it does in

the case of fiscal or penal statutes, *Samuel* v. *Newbold,* (1906) A.C. 461 (467) ; also *Jogodanund* v. *Amrit Lal,* 22 Cal. 767 (780). In administering the law, the *function of the Court is* simply to *interpret,* and to give effect to, it ; the Courts should not arrogate to themselves the functions of the Legislature, but they are to take the law as it stands, to ascertain its meaning and then to apply it to the particular circumstances of the case which they have been called upon to decide, Comp. *Attorney-General* v. *John Higgins,* (1857) 2 H.N. 239 ; *Attorney-General* v. *County Council of West Riding,* (1907) A.C. 29. As to how far the Courts are entitled to press into aid the Pre-amble of an Act in interpreting its provisions, *vide* notes under the last heading. The **Title** of an Act may be resorted to to explain a doubtful clause in it, *Hurro Chunder* v. *Shoorodhone,* 9 W.R. 402 (402) (F.B.). Formerly, there was no title to an Act of Parliament, as then it was virtually a petition by the subject with the King's answer on it and consequently the Titles in the old Acts which were inserted by the Judges in the Judge's version of the statutes were considered to be no part of the Acts. The system of preluding a statute with a *title* was subsequently introduced and now the title of an Act is a part of it. This historical change in the frame-work of statute law has been indicated by Lidley, M.R. in *Fielding* v. *Morley Corporation,* (1899) 1 Ch. 1 ; read also *Dartford Rural District* v. *Bexley Heath Railway Co.,* (1898) A.C. 210,—affirming, (1896) 2 Q.B. 74. In interpreting the language of a statute, the Court should always follow its plain meaning, *Administrator-General* v. *Premlal,* 22 Cal. 788 (P.C.) ; *Bank of England* v. *Vagliano,* (1891) A.C. 107. Cf. *Alfred Wilkinson* v. *Wilkinson,* 47 Bom. 843. Consult also the case-laws at pp. 3-4 of author's *Bengal Tenancy Act,* 2nd Edn.

The Marginal Notes of the diverse sections of the Act are intended merely to indicate their object ; they are simply *temporanea exposita* of the sections and form no parts thereof, and, therefore, they cannot be looked into for the purpose of construing the same, *Thakurain Balraj Kunwar* v. *Raja Jagatpal,* 31 I.A. 132=26 All. 393=8 C.W.N. 699 (705), P.C.; *Ellen Street Estates* v. *Minister of Health,* (1934) 1 K.B. 590=103 L.J. (K.B.) 364 ; *Bahadur Molla* v. *K. E.,* 41 C.L.J. 45. Cf. *Kameshar Prasad* v. *Bhillan Narain,* 20 Cal. 609. As to how far the **Headings** of chapters or groups of sections may be taken into consideration in interpreting the provisions of the Act, see *Dwarkanath* v. *Tafazar,* 44 Cal. 267 =20 C.W.N. 1097=39 I.C. 64, according to which it is quite permissible to look into such headings for the purpose of interpreting the sections falling within the particular chapter or group of sections concerned ; also *Re Shiu Lal,* 34 Bom 316 ; *Janki Singh* v. *Jagannath,* (1917) Pat. 318=42 I.C. 177. With respect to this

matter Mr. Justice Baron Channell has thus observed in *Eastern Counties* v. *Marriage,* (1860) 9 H.L.C. 31, at p. 40: "These various headings are not to be treated as if they were marginal notes, or were introduced into the Act merely for the purpose of classifying the enactments. *They constitute an important part of the Act itself.* They may be read, not only as explaining the sections which immediately follow them, as a Pre-amble to a statute may be looked to, to explain its enactments, but as affording, as it appears to me a better key to the constructions of the sections which follow than might be afforded by a mere pre-amble". It should, however, be remembered that such headings should never be pressed into a constructive limitation upon the exercise of the powers given by the *express* words of the sections, *Abdul Rahim* v. *Municipal Commissioners of Bombay,* 45 I.A. 125=42 Bom. 462=23 C.W.N. 110=48 I.C. 63 (P.C.). The **Schedules** are taken as a part of the statute itself, *Lal Bala* v. *Ahad Shah,* 29 C.L.J. 165=23 C.W.N. 233 (P.C.); but they cannot override the plain meaning of the sections themselves, *Koylash* v. *Sanatan,* 7 Cal. 132 (135); consult *Mahomed Syedol* v. *Yehool Gark,* (1916) 2 A.C. 575=43 I.A. 256=21 C.W.N. 257 (P.C.); *Satish Chandra* v. *Ramdayal,* 32 C.L.J. 94=24 C.W.N. 982; *Altap Ali* v. *Jamsur Ali,* 30 C.W.N. 334=A.I.R. 1926 Cal. 638=93 I.C. 909. A **proviso** should be read along with the substantive part of the section to which it is a supplementing condition, [*Maha Prasad* v. *Ramani Mohan,* 41 I.A. 197=42 Cal. 116=20 C.L.J. 231, P.C.], but it cannot extend the meaning of that substantive provision of the Act; therefore, arguments from a *proviso* which seek to extend the operative effect of the substantive enactment are not legitimate unless there is real ambiguity in the substantive enactment, *Ram Chunder* v. *Gowri Nath,* 53 Cal. 492=A.I.R. 1926 Cal. 927=97 I.C. 376—following *West Derby Union* v. *Metropolitan L.A.C.,* [1897] A.C. 647.

As to how far reference to the *prior state of the law* is permissible, the reader would do well to refer to *Mahammed Hushen* v. *Jamini Nath,* I.L.R. (1938) 1 Cal. 607=42 C.W.N. 38=A.I.R. 1938 Cal. 97=176 I.C. 41. Authorities have differed with respect to the question as to how far the legislative papers can be consulted for the purpose of construing a statute. Read a very learned Article in 43 C.W.N. cxiv (114) in which this topic has been well canvassed.

Rules framed under the Act: A rule framed under the Act should not be referred to for the purpose of construing an Act of the Legislature, *Sheik Intaz* v. *Dinanth,* 53 Cal. 615=43 C.L.J.

425=30 C.W.N. 803=A.I.R. 1926 Cal. 856=96 I.C. 72. Read the notes under sec. 44, *post.*

If the Act is *ultra vires* of the Provincial Legislature : The Provincial Legislature has power to pass an Act dealing with money-lending or to control money-lenders. This is evident from section 100(3) of the Government of India Act, 1935, read with List II ("Provincial Legislative List") in the Seventh Schedule thereof. Item No. 27 of the said List has specifically mentioned "money-lending and money-lenders". [N.B. For meaning of these terms, read the notes at pp. 32-33, *post*]. Therefore, the present enactment, *prima facie*, is not *ultra vires* of the Provincial Legislature. Under section 108(2), of the Government of India Act, 1935, a Provincial Legislature cannot pass an enactment which contains provisions *repugnant* to those of any Governor-General's Act except with the previous sanction of the Governor-General and if the intended enactment contains provisions repugnant to those of any Governor's Act, previous sanction of the Governor of the Province will be necessary. It has been seen at p. 1 that the present Money-Lenders Act makes provisions for the better control of money-lending and *is prima facie* not meant to be *repugnant* to any of the existing enactments relating to money-lend ing and money-lenders, but in order to make it an effective legal machinery, the Legislature has thought it fit to make other provisions than those contained in some of the Governor-General's Acts or the Governor's Acts. For example, we have provisions in this Act which are more progressive and revolutionary than the provisions of the Indian Contract Act, the Usurious Loans Act or the Usury Laws Repeal Act, 1855, or those of the T. P. Act, or the Civil Procedure Code (*vide* secs. 30,34 & 36 of the Act) ; similarly, there are also provisions in it which have made greater advancements than some of the Governor's Act, for example, the Bengal Money Lenders Act, 1933. But, in point of reality, there is no repugnancy as between this Act and any of the aforesaid Acts. Repugnancy, as pointed out by Sulaiman J., should not be extended to a section *by implication* if it does not in fact exist ; see *Shyamakant Lal* v. *Rambhajan Singh,* 71 C.L.J. 369=43 C.W.N. (F.C.R.) 68=(1939) F.C.R. 193=182 I.C. 161. When the question is whether a Provincial legislation is repugnant to an existing Indian law, the onus of showing its repugnancy and the extent to which it is repugnant should be on the party attacking its validity. There ought to be a presumption in favour of validity and every effort should be made to reconcile them and construe both so as to avoid all conflict between them, *Ibid,* Read, in this connection, *Attorney-General for British Columbia* v.

Attorney-General for Canada, (1937) A.C. 377 (388) ; ***Kutner*** v. *Philips*, (1891) 2 Q.B. 267=60 L.J.Q.B. 505. Statutes become inconsistent or repugnant to each other when they cannot stand together at the same time, *Clyde Engineering Co.* v. ***Cowburn***, 37 C.L.R. 466 ; *G. P. Stewart* v. *Brojendra Kishore*, 69 C.L.J. 573=43 C.W.N. 913. To give a more progressive character to a law is not to introduce an element of such repugnancy or inconsistency in it. Therefore, the present Act is not *ultra vires* of Provincial Legislature. It has made no encroachment on the rights of the Central Legislature. It will be noticed that the present Act has scrupulously excluded from its scope all those subjects which legitimately come within the purview of the Federal List. such as banking and so forth. The Act has however made certain provisions about promissory notes and mortgage suits and for that reason it might be regarded as having encroached upon certain Central Acts and to obviate all controversies as to the validity of the Act the Bengal Government has obtained the sanction of the Governor-General in advance. Therefore, no question of *ultra vires* can possibly now arise, see 71 C.L.J. 369, *supra* ; also *Byramji Jeejeebhoy* v. *Province of Bombay*, 42 Bom.L.R. 10.

CHAPTER I.

Introductory.

Short title, extent and commencement.

1. (1) This Act may be called the Bengal Money-lenders Act, 1940.

(2) It extends to the whole of Bengal.

(3) It shall come into force on such date as the Provincial Government may, by notification in the *Official Gazette*, appoint.

Sub-sec. (2) : **Extent of the Act :** The Act extends to the *whole* of Bengal, including even the Scheduled districts. From a reference to the First Schedule of the Scheduled Districts Act (xiv of 1874) it will be seen that in the Province of Bengal there are only three Scheduled districts—(1) Jalpaiguri District, (2) Darjeeling District and (3) the Hill Tracts of Chittagong. As regards the tract known as the Darjeeling District (excluding the sub-division of Kalimpong) it may be noted that it was ceded by the Rajah of Sikkim to the British Government in 1835 and since then it has formed part of Bengal. Kalimpong sub-division which

is on the east side of River Teesta was taken from the suzerainty of Bhutan after the war of 1864 and was placed under the Deputy Commissioner of Western Duars in the first instance and was subsequently transferred to the Darjeeling district in 1866. The province of Bengal now includes the whole of the district of Darjeeling including Kalimpong sub-division.

Sub-section 2 deals with the question of local extent and sub-section (3), with that of operation. Compare these two sub-sections with the respective sub-sections (2) and (3) of the first sections of the Bengal Agricultural Debtors Act, 1935 (Beng. Act vii of 1936) and of the Bengal Village Self Government Act (Bengal Act V of 1919). In declaring the local extent and in fixing the date of commencement of operation, all these Acts follow the same principle with this exception that in the latter two, Acts, the Provincial Government has been given the option of bringing the different parts of the Province under the operation of those Acts at different times. But that is not possible with the present Act. The Provincial Government may defer the commencement of the operation of this Act, but it will have no power to adopt the principle of piecemeal introduction of the Act in the different parts of the Province. Where a date is announced under sub-section (3), the working of the Act is simultaneously commenced in all the parts of the Province. In this connection, read author's *Bengal Agricultural Debtors Act,* under the heading "Operation in Notified Areas" at p. 4.

Conflict of Laws : A question of some interest may arise as to how far this Act is to be applied in cases where the contract of loan is made in another province or territory, but the suit upon it is instituted in Bengal or where the contract is made here but the suit is instituted in another jurisdiction which is the place of the defendant's residence [see section 20 of the C. P. Code], or of the performance of the contract. For a solution of this question, reference should always be made to Dicey's *Conflict of Laws,* R. 152, because the Indian Contract Act does not furnish any clue to it. The Extension clause [sub-section (2)] of this section read with sub-section (13) of section 2 may render some assistance in the matter. In England, they formerly applied *lex loci contractus* (*vide* notes at p. 32, *post*) and not the *lex fori* in such cases, [*Shrichand* v. *Lacon,* (1906) 22 T.L.R. 245 ; *Velchand* v. *Manners,* (1909) 25 T.L.R. 329], on the presumption [if not rebutted by proof of contrary intention] that the *lex loci contractus* will be the *lex loci solutionis* for the place where the performance of the contract is to take place. [Read *Lloyd* v. *Guibert,* (1865) L.R. 1 Q.B. 115]. But this position has since been abandoned even in

England by the new Money Lenders Act of that country, and the present Bengal Act leans towards the present prevalent English opinion and that is why in sub-section (13) of section 2, the place of business of the lender has been made the chief determining factor of the applicability of this Act, and in the above *extension* clause, the operation of the Act has been limited to Bengal only. The effect of all these provisions is that there is a *prima facie presumption* or an implication as contemplated in section 49 of the Indian Contract Act, that this province is the place where the contract of loan has to be performed. A suit upon a loan contracted in Bengal and taken from a Bengal money-lender should be instituted in Bengal, see *Bansilal Abirchand* v. *Gulam Mahbub,* 53 I.A. 58=53 Cal. 88=43 C.L.J. 1=30 C.W.N. 577=92 I.C. 760, P.C. Although, a contract of loan is made in this Province with a money-lender who has also a place of business in this province, the operation of the Act may be evaded by pursuing the defendant in a different province on the strength of section 17 or section 20 (a) of the Code of Civil Procedure, or by a distinct stipulation between the parties (embodied in the contact of loan itself or in any contemporaneous writing) that the terms of the contract are to be carried out in another province or territory, read Lord Esher's observations in *Chatenay* v. *Brazilian S. T. Co.,* (1891) 1 Q.B. (C.A.), at pp. 82-83; and Lord Watson's observations in *Hamlyn* v. *Talisker Distillery,* (1894) A.C. 212; also the notes at p. 32, *post,* and *Abdul Aziz* v. *Appayasami,* 31 I.A. 1=27 Mad. 131. Where the loan is secured by immoveable property in this province, the suit upon it has to be instituted in this province [see section 16 of the C. P. Code], and if the lender satisfies the requirements of section 2 (13), this Act will invariably apply, inasmuch as the general implication is that if the creditor is within the realm [*Bansilal Abirchand* v. *Ghulam Mahbub,* 53 I.A. 58=53 Cal. 88=43 C.L.J. 1=30 C.W.N. 577 =92 I.C. 760] the debtor should find him out and pay him at his address, [*Soniram Jeetmull* v. *Tata & Co.,* 54 I.A. 265=5 Rang. 451=45 C.L.J. 633=31 C.W.N. 998=A.I.R. 1927 P.C. 156 =102 I.C. 610 P.C.]. If the lender does not fulfil the requirements of section 2 (13), the general law of the land will govern the case. Under section 17 of the C. P. Code, when the mortgaged properties are situated partly within, and partly outside, Bengal, a suit in respect of the mortgage can be instituted in Bengal as well as outside it, *Tincouri* v. *Shibcharan,* 21 Cal. 639. In such a case, the provision of this Act, as noticed above, can be evaded by instituting the suit outside Bengal. A further difficulty may arise when the mortgage includes *also* a property within the Sonthal

Pargannas, because in such a case, according to some opinion, section 5 of the Sonthal Pargannas Regulation III of 1872 creates an exclusive jurisdiction in favour of the Settlement Officers of Sonthal Pargannas [See *Maha Prasad Singh* v. *Ramani Mohan,* 41 I.A. 197=42 Cal. 116=20 C.L.J. 231=18 C.W.N. 994, P.C.] and this Act cannot possibly override the said Reg. III of 1872. But it may be mentioned that the dictum in *Maha Prasad Singh's* case is an *obiter,* and the suit may be instituted either in Bengal or in the Sonthal Pargannas and the net effect so far as the debtor is concerned will not materially differ inasmuch as there is not much divergence between this Act and the above S. P. Regulation. Besides, it will be open to the lender to give up the Sonthal Parganna properties and restrict his claim to the Bengal properties only.

Sub-section (3) : **Commencement of Operation :** The Act will come into operation on the date which will be appointed for the purpose by means of a Government notification. It is necessary that the notification has to be published in the Official Gazette. Section 6 of the Bengal General Clauses Act (Bengal Act I of 1899) provides that where any Bengal Act is not expressed to come into operation on a particular date, then it shall come into operation, if it is an Act of the Legislature, on the day on which the assent thereto of the Governor, the Governor-General, or His Majesty, as the case may require, is first published in the Official Gazette, and, if it is an Act of the Governor, on the day on which it is first published as an Act in the official gazette. In the case of this particular statute, sub-section (3) of its section 1, itself provides that the Act is to come into operation from a particular day. When a statute is expressed to come into operation on a particular day, it comes into force immediately on the expiration of the day preceding its commencement; see sub-sec. (2) of Sec. 6 of the Bengal General Clauses Act (Bengal Act I of 1899). Read section 36(2) of the English Interpretation Act, 1889 [52 & 53 Vict. Ch. 63.]. It may be mentioned here that the present sub-sec. (1) of sec. 6 of the Bengal General Clauses Act was substituted by the Government of India (Adaptation of Indian Laws) Order, 1937, Sch. IV.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "bank" means a banking company as defined in section 277F of the Indian

Companies Act, 1913, whether incorporated in or outside British India;

(2) "borrower" means a person to whom a loan is advanced and includes a successor-in-interest or surety;

(3) "Calcutta" means the area within the limits of the ordinary original civil jurisdiction of the High Court in Calcutta;

(4) "commercial loan" means a loan advanced to any person to be used by such person *solely* for the purposes of any business or concern relating to trade, commerce, industry, mining, planting, insurance, transport, banking or entertainment, or to the occupation of wharfinger, warehouseman or contractor or any other venture of a mercantile nature, whether as proprietor or principal or agent or guarantor;

Explanation.—Nothwithstanding anything contained in any agreement relating thereto, a loan shall not be deemed to be a commercial loan unless it is in substance a loan to be used *solely* for any of the purposes referred to in this clause.

(5) "co-operative life insurance society," "mutual insurance company" and "provident society" have the same meanings as in the Insurance Act, 1938;

(6) "co-operative society" means a society registered under the Co-operative Societies Act, 1912, or any Act of the Provincial Legislature, for the time being in force, relating to such societies;

(7) "insurance company" means—

(*a*) in relation to any loan advanced before the commencement of the Insurance Act, 1938, an insurance company within the meaning of the

Indian Insurance Companies Act, 1928, and

(*b*) in relation to any loan advanced after the commencement of the Insurance Act, 1938, an insurance company within the meaning of that Act;

(8) "interest" includes any sum by whatsoever name called, in excess of the principal paid or payable to a lender in consideration of, or otherwise in respect of, a loan whether the same is charged or sought to be recovered specifically by way of interest or otherwise, but does not include any sum *lawfully* charged by a lender in accordance with the provisions of this Act or any other law for the time being in force for or on account of costs, charges or expenses;

(9) "lender" means a person who advances a loan and includes a money-lender;

(10) "licence" means a licence granted under this Act;

(11) "life assurance company" has the same meaning as in the Indian Life Assurance Companies Act, 1912;

(12) "loan" means an advance, whether of money or in kind, made on condition of repayment with interest and includes any transaction which is in substance a loan but does not include—

(*a*) a deposit of money or other property;

(*b*) a loan to, or by, or a deposit with, society or association registered under the Societies Registration Act, 1860, or under any other law relating to public, religious or charitable objects;

(*c*) a loan taken or advanced by any Government in British India or by any local authority in Bengal;

(*d*) a loan advanced before or after the commencement of this Act—

(*i*) by a bank which was a scheduled bank on the first day of January, 1939, or by a bank which has been declared to be a notified bank under section 3, whether or not such bank was a scheduled bank or was so declared to be a notified bank, as the case may be, at the time the loan was advanced; or

(*ii*) by a Co-operative Life Insurance Society, Co-operative Society, Insurance Company, Life Assurance Company, Mutual Insurance Company, Provident Insurance Society or Provident Society or from a Provident Fund;

(*e*) an advance made on the basis of a negotiable instrument as defined in the Negotiable Instruments Act, 1881, other than a promissory note;

(*f*) a commercial loan;

(*g*) a loan advanced to any person for purchase or construction of a house or for the construction of a house together with the purchase of the site thereof, within the limits of the area defined by clause (*11*) of section 3 of the Calcutta Municipal Act, 1923, or of any area which has been or may hereafter be constituted a municipality under the provisions of the Bengal Municipal Act, 1932, if such loan is subject to the condition of repayment by instalments extending over a period of ten years or more;

(*h*) a loan made to or by the Administrator-General and Official Trustee

of Bengal or the Commissioner of Wakfs or the Official Assignee or the Official Receiver of the High Court in Calcutta.

(*i*) a loan or debenture in respect of which dealings are listed on any Stock Exchange;

(13) "money-lender" means a person who carries on the business of money-lending in Bengal or who has a place of such business in Bengal, and includes a pawnee as defined in section 172, of the Indian Contract Act, 1872;

(14) "money-lending business" and "business of money-lending" mean the business of advancing loans either *solely* or in conjunction with any other business;

(15) "prescribed" means prescribed by rules made under this Act;

(16) "principal" means in relation to a loan the amount actually advanced to the borrower;

(17) "provident fund" has the same meaning as in the Provident Funds Act, 1925;

(18) "provident insurance society" means a society registered under the Provident Insurance Societies Act, 1912;

(19) "register" means a register of money-lenders maintained under section 7;

(20) "scheduled bank" has the same meaning as in the Reserve Bank of India Act, 1934;

(21) "suit" includes an appeal;

(22) "suit to which this Act applies" means any suit or proceeding instituted or filed on or after the 1st day of January, 1939, or pending on that date and includes a proceeding in execution—

(*a*) for the recovery of a loan advanced before or after the commencement of this Act;

(*b*) for the enforcement of any agreement entered into before or after the commencement of this Act, whether by way of settlement of account or otherwise, or of any security so taken, in respect of any loan advanced whether before or after the commencement of this Act; or

(*c*) for the redemption of any security given before or after the commencement of this Act in respect of any loan advanced whether before or after the commencement of this Act.

The Section : The section says that the various terms mentioned in its different clauses are to be understood in the senses assigned to them, *unless there is anything repugnant in the subject or context.* So, where a term, which has been defined in this section, appears to have been used in a particular sense in a particular context and that sense seems to be in conflict with the meaning assigned to the term in this definition clause, then that contextual sense is to prevail over the meaning assigned to it by this section.

Effect of a Definition Clause : When a term is defined in an Act, it should all throughout the Act, be understood in the sense assigned to it by the Act, *Uma Charan* v. *Ajedunnessa,* 12 Cal. 430 (433) ; *Q. E.* v. *Ram Lal,* 15 All. 141. The words of an enactment must be taken first in the sense given to them by the Legislature and secondly in their natural meaning, if not inconsistent with the Pre-amble or the context, *Robert Wigram* v. *Richard,* 4 M.I.A. 179. When the term is not so defined, it is to be understood in its popular or dictionary meaning, unless a contrary intention *prima facie* appears, *Janki* v. *Sahebunnessa,* 7 O.C. 74 ; or, in the sense in which it had previously been used, *Ruckmaboye* v. *Lulloobhoy,* 5 M.I.A. 234 (250). When the Legislature in its wisdom has left a term undefined, the Court should not lay down a rigid definition for it, and thereby crystallise the law, *Krishna Charan* v. *Sarat Kumar,* 44 Cal. 162 (178)=25 C.L.J. 24=21 C.W.N. 740=34 I.C. 609. The section in express

terms says that the various terms defined in the different sub-sections of this section should be understood in the respective senses assigned to them only if there is nothing *repugnant in the subject or context.* This is in accord with the rule laid down in *Robert Wigram* v. *Richard, supra,* and means that if the context shows that in any particular section any of the defined terms has been used in a sense different from that in this definition clause, then that contextual sense will prevail over the definition given herein.

Means and Includes : It must have been noticed that in some of the clauses of this section, the word "means" has been used and in others the word "includes". Where in an interpretation clause the word "includes" is used, it is to be understood that the term defined is intended to retain its ordinary meaning, and the Legislature simply widens its scope by specific mention of certain matters which its ordinary meaning may or may not comprise, *Official Assignee* v. *Firm of Chandulal,* A.I.R. 1924 Sind, 89=76 I.C. 657. The Legislature uses the word "means" where it wants to exhaust the significance of the term defined, [see *Q. E.* v. *Ramanjiyya,* 2 Mad. 5 (7) ; *Q. E.* v. *Asutosh,* 4 Cal. 483 (F.B.)], and the word "includes" where it simply desires the definition to be only enumerative and not exhaustive ; read in this connection *Balvantrao* v. *Puroshotam,* 9 Bom.H.C.R. 99 (106) ; also *Rodger* v. *Harrison,* (1893) 1 Q.B. 167 (171).

Sub-section (1) : **Bank :** A *bank* in this Act is to be understood in the same sense as the expression "banking company" is understood in the new section 277 F of the Indian Companies Act, 1913 [introduced in the Act by the Amending Act xxii of 1936]. Notice the word "means" in this clause. The difference between the words "means" and "includes" occurring in this definition clause has been explained under the last heading ; the word "means" indicates that the term *bank* in this Act and the expression "banking company" in section 277 F of the Indian Companies Act are *exactly* co-extensive, and an institution which does not fall within the definition of a "banking company" as given in said section 277 F, cannot be regarded as a "bank" within the meaning of this Act. A banking company has been defined in the Indian Companies Act (section 277F) as a company which carries on as its principal business, the accepting of deposits of money on current account or otherwise, subject to withdrawal by cheque, draft or order, in addition to one or more of the several forms of business specified in the said section 277F of the Indian Companies Act. This definition is primarily limited to the banking companies formed on or after the 15th January

1937 (which is the date of commencement of the operation of the Amending Act of 1936). With respect to the banking companies formed before that date, section 277 G of the Indian Companies Act has provided that no banking company whether incorporated in or outside British India shall after the 15th day of January, 1939 (i.e. after the expiry of two years from the commencement of the operation of the Act of 1936) carry on any form of business other than those specified in section 277 F of the Act. From a reference to the list of various forms of business mentioned in the section, it will be found that it is wide enough to embrace all forms of ordinary business that are every day transacted by our banks. Regarding the meaning of the term "bank" it will be profitable to consult Hart's *Law of Banking* and Lord Hatherley's observations in *Copland* v. *Davies,* (1872) L.R. 5 H.L. 358.

The word "Bank" seems to have been derived from the mediaeval terms "banco", "bancus" which signified the benches on which old money-lenders and money changers used to display their coins. Although the modern banking system has been taken practically from the western countries, still all throughout there has been a regular indigenous banking system in this country as will be evident from the works of the old Smritiwriters. The native 'seths' and 'shroffs' were the old bankers of the country and the name of the Jagat Seth, banker of the world, is a household word with the people of this province. For the history of banking in this country, the readers will do well to consult Davar's *Law and Practice of Banking,* 2nd Ed., Chapter I, pp. 1-21.

A bank being a banking company within the meaning of section 277 F of the Indian Companies Act, the question naturally arises as to whether a firm of partners carrying on the various kinds of business contemplated by said section 277F can be regarded as a *bank*. Ordinarily, a Company means an association of persons united for a common object [*Smith* v. *Anderson,* (1880) 15 Ch D. 247] and may comprise a partnership firm; but the term "Company" in the Indian Companies Act has got a technical meaning. Section 2 (2) of that Act defines a "company" as one "formed and registered under this Act (i.e. the Indian Companies Act) or an existing company" and section 2 (7) says that "existing company" means a company formed and registered under the Indian Companies Act, 1866, or under any Act or Acts repealed thereby or under the Indian Companies Act, 1882. Therefore, a company not registered under the Indian Companies Act, old or new, cannot be a bank, although it may do the

various forms of banking business; consequently, a mere firm of persons cannot claim to rank as a bank within the meaning of this Act simply for the reason that it does banking business. A banking company registered under the Indian Companies Act is a distinct legal person and exists as such irrespective of the members forming it. [Cf. *Re Saloman Co. Ltd.*, (1897) A.C. 22; *Farrar* v. *Farrar*, 40 Ch.D. 395 (409)], but a mere banking firm is not so; a firm is nothing but a collective name of a body of individual partners [*Seodayal* v. *Joharmal*, 50 Cal. 549=A.I.R. 1924 Cal. 74=75 I.C. 81; *Exparte Corbett*, (1880) 14 Ch.D. 122 (126)], and the property of the firm is the property of the partners themselves, but in the case of a company, the property is the property of the company and not of its members, see *Re George Newman & Co.*, (1895) 1 Ch. 685.

Sub-section (2): **Borrower:** Is the person who borrows money or receives a loan from another person with the expressed or implied intention of returning the money or repaying it. This is the dictionary sense of the term; but as the term has frequently been used in this Act, the Legislature has thought it fit not to leave it to be interpreted in this Dictionary sense, but has given it an *exhaustive* definition by using the word "means", *vide* notes under the next preceding the last heading. The Legislature, however, instead of defining it in an active form, has defined the term in a passive form by saying that it means a person to whom a loan is advanced. "Loan" has been defined in sub-section (12) of the section to mean an *advance*. So what the Legislature has said here stands something like this—a borrower is a person to whom a loan has been loaned out. To define a term in such a tautological form is not very helpful to one's understanding. As to what is "to borrow or raise money upon credit" under the English law, see section 19 of 58 G. 3, c. 45 and *V. R.* v. *St. Michael*, 6 F. & B. 807=25 L.J.Q.B. 579. Existence of the loan is an essential condition to clothe a person with the character of a borrower; so when the loan is repaid, the borrower, too, ceases to exist. A power to borrow or to take up money on interest gives power to raise money on any kind of security for its repayment at a future date, *Bank of England* v. *Anderson*, 6 L.J.C.P. 158; *Booth* v. *Bank of England*, 7 Cl. & F. 509. Under section 3 (32) of the Bengal General Clauses Act (I of 1899, B.C.), the word "person" includes a body of individuals; therefore, a group of persons jointly receiving a loan, become joint borrowers. The word "is" in the sub-section implies the subsistence of the debt.

The term, "borrower", in this sub-section includes the **successor-in-interest** and **surety** of the borrower. Although neither the legal representatives of the borrower, nor his sureties are directly responsible for the loan, still they have been included in the term 'borrower', just to give them the benefit of the Act. If the person *primarily* responsible for the loan is entitled to *relief* there is no reason why the persons, who have not themselves enjoyed the money, but have been made responsible for the payment of the same under the law, should not have the right to the very same *relief* which could be claimed by the actual borrower. Cf. *Baijnath Pandan* v. *Dennett,* 47 All. 745=A.I.R. 1925 All. 400=88 I.C. 78. For the case of the surety, *vide* notes under the next heading. The obligation of the legal representatives of the promisor to perform or fulfil the undertakings of the promisor has been recognised in sections, 40, 42 and 45 of the Indian Contract Act, and section 146 of the Civil Procedure Code, 1908, provides that a legal proceeding which may be taken against a party can be taken against any other person who claims under him. The personal laws of the land (such as Hindu Law and Mahomedan Law) also contemplate devolution of liabilities, although they limit such liabilities to the assets coming from the predecessor-in-interest to the successors. Even if the term borrower had not expressly included the successor-in-interest in this sub-section, still then the position would have exactly been the same under the general law of the land. The term "successor-in-interest" is wide enough to cover all cases of devolution of liabilities, whether by inheritance or assignment or otherwise. All the legal representatives of the borrower, including his executor, administrator and trustee will come within the scope of the term. The borrower's assigns also fall under it, subject however to the equitable rule of protection for a *bona fide* assignee for value without notice. It may here incidentally be pointed out that for the purposes of the Bankruptcy Act, the term *debtor* does not include his legal representatives, read author's *Provincial Insolvency Act,* 3rd Ed. p. 1 and *Bengal Agricultural Debtors Act,* p. 20; consult also *Nagasubramania* v. *Krishnamachariar,* 50 Mad. 981=A.I.R. 1927 Mad. 922=104 I.C. 642; *Abdul Rahaman* v. *Gajendra Lal,* I.L.R. (1938) 1 Cal. 132=66 C.L.J. 346=41 C.W.N. 1288.

Surety: The term "borrower" as defined here is expressly stated to include the borrower's surety. Under section 126 of the Indian Contract Act, a surety is the person who gives a guarantee for the due discharge of the liability of a debtor in the case of default of repayment of the debt by the latter, and under section

128 of the said Act, the liability of the surety is *co-extensive* with that of the principal debtor unless it is otherwise provided by the contract of guarantee. So, it is but proper that the privileges which a debtor enjoys under this Act, should also be claimable by his surety, otherwise the surety's liability will not exactly be *co-extensive* with that of the debtor, but greater than the same. Comp. *Baijnath Pandan* v. *Estate of E. C. Dennett,* 47 All. 745=A.I.R. 1925 All. 400=88 I.C. 78. A statute which gives a defence to the borrower cannot possibly refuse to give a similar defence to his surety, *Temperance Loan Fund Ltd.* v. *Rose,* (1932) 2 K.B. 522, and that is why the term, "borrower", has been made to include his surety. A surety, upon payment or performance of all that he is liable for under the contract of guarantee becomes invested with all the rights which the creditor had against the principal debtor, see section 140 of the Indian Contract Act; that is, when he has fulfilled his obligations, the surety becomes subrogated to the position of the creditor, see *Jasvatsingji* v. *Secretary of State,* 14 Bom. 299, citing *Simpson* v. *Thomson,* (1877) 3 A.C. 279. Cf. *Phillips* v. *Mitchell,* 50 C.L.J. 303; *Mitchell* v. *Phillips,* 57 I.A. 208=34 C.W.N. 720=A.I.R. 1930 P.C. 224=130 I.C. 319, P.C.; *Govardhandas* v. *Bank of Bengal,* 15 Bom. 48 (63); *Coorla Spinning* v. *Vallabhdas,* A.I.R. 1925 Bom. 547=94 I.C. 575 [the surety being *invested* with the rights of the creditor, there is no necessity for any assignment of the creditor's interests to him]; *Krishnasami* v. *Gopal Krishna,* A.I.R. 1927 Mad. 421=99 I.C. 676; *Re Beulah Park Estate,* (1872) L.R. 15 Eq. 43. Being relegated to the position of the original creditor [*Heera Lall* v. *Syud Oozeer,* 21 W.R. 347], he becomes entitled to recover interest from the principal debtor, *Madar Bakshah* v. *Ahmed Ali,* 98 P.R. 1881. This, however, does not mean that a relationship of lender and borrower within the meaning of this Act is established between the surety and the original debtor.

It may incidentally be pointed out here that there may be cases in which the liability of the surety will remain alive, although the debt might have become time-barred as against the principal debtor, *Kristo Kishore* v. *Radha Ramun,* 12 Cal. 330, referred to in *Birendrajit* v. *Renupada.* 40 C.W.N. 465. Cf. 26 Mad. 239; 5 Bom. 647; also referred to in *Brojendra Kishore* v. *Hindusthan Co-operative Insurance Co.,* 44 Cal. 978=25 C.L.J. 238=21 C.W.N. 482=39 I.C. 705. As to the period of **limitation** in respect of suits against the surety on a loan, consult Arts. 65, 68 and 83 of the Indian Limitation Act.

Sub-section (3): **Calcutta:** In this Act, "Calcutta" is co-extensive with the area within which the Calcutta High Court

can exercise its *ordinary* original civil jurisdiction. The word "ordinary" is worth specific attention, as the High Court can, under special rules and under special circumstances, assume *extra-*ordinary jurisdiction over matters falling beyond the local limits of its ordinary original jurisdiction. Under clause 11 of the Letters Patent for the High Court of Calcutta, the local limits of the ordinary original jurisdiction of the High Court are what have been fixed by the proclamation issued by the Governor-General in Council on the 10th. September, 1794. Said clause 11 of the Letters Patent provided that the original limits fixed by the said Proclamation could be altered by subsequent legislation. In conformity with this provision, in 1919, the High Court (Jurisdictional Limits) Act (Act XV of 1919) was passed fixing the new boundaries for territorial Jurisdiction of the Original Side of the Calcutta High Court by means of a Schedule. Therefore, the area mentioned in the said Schedule will be "Calcutta" for the purposes of this Act. Compare this definition of Calcutta with that given in Schedule I of the Calcutta Municipal Act, 1923.

Sub-section (4) : **Commercial Loans :** Is a loan advanced to any person to be used by such person solely for the purposes of any business or concern relating to trade, commerce etc. The word "person" has been defined in section 3 (32) of the Bengal General Clauses Act to include any company or association or body of individuals whether incorporated or not. It is in this wide sense that the term "person" has been used here. Whether a loan is a commercial loan or not is to be determined with reference to the purpose for which it has been advanced. If the money advanced by the lender is intended *to be used* by the borrower *solely* for the purposes of any business or concern relating to trade, commerce etc., then and then only the loan will be a commercial loan, otherwise not. Under sub-section 12(f) of this section a Commercial loan has been exempted from the operation of this Act ; therefore, it is of the utmost concern for a Court to scrutinise a loan transaction which is claimed to be exempted from the operation of the Act under said sub-section 12 (f) and see whether the loan comes strictly within the terms of this definition. If the money is intended to be used for purposes other than those mentioned in this sub-section it will not be a commercial loan. The Court will look to the object of the loan and not to the *ultimate application* of the loan-money. If at the inception of the loan, the money was advanced for commercial purposes, the lender will get benefit of the exemption provisions of sub-section 12 (f) notwithstanding the fact that the borrower ultimately applied money for other purposes than commercial.

The word "solely" in the section is very important; the money should be intended to be used *solely* or *exclusively* for commercial purposes. If it was partly taken for commercial purposes and partly for other purposes, the lender will not be entitled to stand outside this Act. Commercial purposes are purposes of business or concern relating to trade, commerce, industry, mining, planting, insurance, transport banking or entertainment or relating to the occupation of wharfinger, warehouseman or contractor or any other venture of a mercantile nature, whether the borrower is a proprietor or a principal or an agent or a guarantor of the business or concern in question. The *Explanation* appended to the section is very important as it takes away the benefit of the exemption provisions of sub-section 12 (f) from a loan which is, *in form*, a commercial loan, but in reality is not so. The opening words of the Explanation, namely, "Notwithstanding anything contained in any agreement relating thereto" imply that a transaction which is not intrinsically a commercial loan will not be regarded as such for the purposes of this Act, simply because the parties have *agreed* to call it so or give it the style of a commercial loan. By reason of the Explanation it will be impossible for a lender to get out the provisions of this Act by means of any camouflage or device. Loans in the garb of hire-purchase agreements (*vide* p. 28, *post*) are not necessarily commercial loans, but they may be regarded as commercial loans if the moneys obtained thereby are intended to be used for purposes of trade and commerce etc.

The commercial purposes enumerated in the section are simply illustrative and not exhaustive. This has been made clear by the expression "or any other venture of a mercantile nature". Thus, fishing or rearing fishes has not been mentioned in the section as one of the purposes of business for whcih a commercial loan can be granted, but the words "any other venture" are wide enough to cover the case of a loan advanced for starting a business of rearing fishes. As to what constitutes *banking* business, *vide* notes under sub-section (1), *Entertainment* includes sports, cinemas and theatres. The amount of the commercial loan does not in any way affect its character.

The expression "commercial loan" as used here is broad enough to include *bottomry, respondentia* and other marine loans.

Marine Loans.

"Bottom" is that part of a ship which is ordinarily under water; hence the term means a ship or a vessel. Therefore, *bottomry* is understood to mean the hypothecation of a vessel or its freight to be earned for advances to defray the expenses of a

voyage. If the ship is lost by perils of the sea, the lender loses his money ; therefore, the rate of interest is generally high. In view of the special risk of this kind of loan, the high rate of interest on such loan has been left untouched by the provisions of this Act. In Article 16 of the Indian Stamp Act; a *bottomry bond* has been defined to mean "an instrument whereby the master of a sea-going ship borrows money on the security of the ship to enable him to preserve the ship or prosecute her voyage". If instead of the ship only, the freight to be earned on the cargo also is hypothecated, it will be the case of a *respondentia bond* which has been thus defined in Article 56 of the Indian Stamp Act : "Any instrument securing a loan on the cargo laden or to be laden on board a ship and making repayment contingent on the arrival of the cargo at the port of destination". The distinction between the two is that in the former case the hypothecation is of the ship with or without the freight, but in the case of the latter the hypothecation is of the cargo only.

If as a part of the consideration for a loan the lender secures some commercial advantages from the borrower, that will not make the loan a commercial loan within the scope of definition of sub-sec. (4) of the section.

Proof of Commercial Loan : As loan-transactions are likely to be wrapped up in various garbs in order to evade the provisions of the Act, questions regarding their true nature are expected to crop up frequently before our Courts. Section 40 (5) of the Act has provided that notwithstanding anything contained in any law for the time being in force, in any suit or proceeding, the **burden** of proving that a loan is a commercial loan *shall* be on the money-lender who advanced the loan. The provisions of said section 40 (5), are mandatory (notice the word *shall*) and prevail over other provisions in other statutes, if any. In order to determine whether a loan is a commercial loan or not, the Courts should go into the questions of intention of the parties and may gather such intention from their conduct, antecedent or subsequent, as also from the surrounding circumstances. A mere recital in the deed that the loan is for a commercial purpose will not be enough. Read also the notes under the heading, "Proof of purpose of Loans", at pp. 31, 32, *post*.

Sub-section (5) : **Co-operative Life Insurance Society :** Has been defined in section 95 (1) (b) of the Insurance Act, 1938 (IV of 1938), as *meaning* "an insurer being a society registered under the Co-operative Societies Act, 1912 (II of 1912) or under an Act of a Provincial Legislature governing the regis-

tration of co-operative societies which carries on the business of life insurance and which has no share capital on which dividend or bonus is payable and of which by its constitution only original members on whose application the society is registered and all policy-holders are members". The expression "co-operative life surance society", in this Act too, should be understood in the above sense. Under the *proviso* to section 95 (1) (b), any co-operative Life Insurance Society in existence at the commencement of the Insurance Act of 1938 shall be allowed a period of one year to comply with the provisions of the said Act. Notwithstanding anything contained in sub-section (1) of section 95 of the Insurance Act, 1938, other co-operative societies may be admitted as members of a Co-operative Life Insurance Society without being eligible to any dividend, profit or bonus [see section 95 (2) of the Insurance Act].

Mutual Insurance Company : Means an insurer, being a company incorporated under the provisions of the Indian Companies Act, 1913, which has no share capital and of which, by its constitution, only all, policy-holders are members [see section 95 (1) (a) of the Insurance Act].

Provident Society : Means a person who, or a body of persons, whether corporate or incorporate, which receives premiums or contributions for securing annuities on human life or receives premiums or contributions for insuring money to be paid on the happening of any of the following contingencies, namely—(a) the birth, marriage, death of any person or the survival by a person, of a stated age or contigency ; (b) failure of issue ; (c) the occurrence of a social, religious or other ceremonial occasion ; (d) loss of, or retirement from, employment ; (e) disablement in consequence of sickness or accident ; (f) the necessity of providing for the education of a dependant ; and (g) any other contingency which may be prescribed or which may be authorised by the Provincial Government with the approval of the Central Government.

Sub-section (6) : **Co-operative Society :** Is a society registered under the Co-operative Societies Act, 1912 (II of 1912) or any Act of the Provincial Legislature for the time being in force relating to such societies. A society not registered or registered under a foreign enactment is not within the meaning of the sub-section.

Sub-section (7) : **Insurance Company :** In relation to a loan advanced *before* the commencement of the Insurance Act, 1938, means an Insurance Company within the meaning of the Indian Insurance Companies Act of 1928 (xx of 1928), and in

relation to a loan *after* the commencement of the Insurance Act, 1938, an insurance company within the meaning of that Act. For the definition of "insurance company" in the Insurance Act of 1938, see section 2 (8) of the said Act.

Sub-section (8) : **Interest :** The word "includes" shows that the definition of the term "Interest" is only enumerative [Cf. *Re Strauss & Co.,* 38 Bom.L.R. 1080] and not exhaustive. The word "includes" is a word of "enlargement" [*Emperor* v. *Jiand,* 22 S.L.R. 349=A.I.R. 1928 Sind, 149=111 I.C. 865, F.B.], and indicates that the dictionary meaning of the term has not been superseded by the definition given here, but it has been simply supplemented by the inclusion of the specific things mentioned in the clause. Compare the definition of the term "interest" as given here with that given in section 2 (1) of the Usurious Loans Act (X of 1918). In this latter Act the term has been used mainly to mean the *rate of interest ;* but in the present Act the question of rate has not been brought in the fore front of the legal concept, but rather its nature and character has been emphasised. Interest is primarily a return or yield from an investment. Whether interest be fixed at a rate or in the lump, the matter is not of much improtance, because all that is but a question of arithmetic. The word interest has been thus defined in *Omda Khanum* v. *Brojendra,* (1873) 20 W.R. 317 (322) : *"Prima facie* the word, 'interest' imports not a penalty for breach of contract, but a return for the use of money and a compensation to the borrower for his risk in lending the money".

Interest will not cease to be interest within the meaning of this clause, simply because the parties have chosen to call it by a different name. If the essence of a payment is that it is *in excess of the principal amount* of a loan and is in consideration of, or otherwise in respect of a loan, it will be interest within the meaning of the term as used here although it has been described by the parties under a different name or description. Thus, if a deduction is made, or a discount is allowed from the principal, at the time of the loan, and the borrower actually receives a smaller sum than that of the loan, the amount so deducted or discounted will be interest within the meaning of the present clause. Such deductions from the nominal principal, made under whatsoever denominations, such as, bonus, commission, fine, premium, charges or preliminary expenses (excepting the charges and expenses referred to in the proviso of section 33), will always be regarded as interest. It does make the slightest difference for the purposes of the present definition whether the lender *charges* or claims the *excess amount* or seeks to recover it, *specifically as*

interest or " otherwise ". The words " whether the same is charged or sought to be recovered specifically by way or interest or otherwise " have evidently been taken from section 2 (1) of the Usurious Loans Act, 1918. " Interest " is a *sum* in excess of the principal ; therefore, in order to ascertain whether a particular sum is interest or not, we must always first ascertain what is the amount of the principal. As to the meaning of the term, "principal", see clause (16) of this section. The word "sum" does not connote *kind*. It is strange that the term " interest " has been defined with reference to *sums* of money and not with reference to quantities of goods. So, in the case of loans in kind or payment of interest in kind, the money value of the goods delivered as interest will fall within the meaning of the word "sum" as used in this clause. This view is warranted by sec. 32, *post*.

Sums of money paid or payable to lender, not in consideration of a loan, but *de hors* it and from other considerations will not be interest as understood here. The word " paid " or " payable " refer to *money*. In relation to goods, the appropriate words will be " delivered " or " deliverable ". Costs and other charges or expenses, to which a lender is entitled under this Act [*vide* section 33, *post*] or under any other law, will not fall within the meaning of interest. Thus, for instance a borrower wants a copy of the bond from the lender on payment of its costs ; these costs will not be interest within the meaning of this sub-section ; see section 25 (3), Proviso, *post*. " Interest " as understood here being only *in consideration of a loan* [which under sub-section (12) hereof being founded on a *condition* of repayment with interest], it follows that the term here is restricted only to *contractual* interests. *Statutory* interests, as under the Interest Act (xxxii of 1839), are not within the scope of the term as used here. Interest awarded by way of damages or compensation for breach of contract or for wrongful detention of money under section 73 of the Indian Contract Act (IX of 1872) is not interest as understood here, because such interest is not in consideration of the loan but for the breach of a contract. In this connection consult the following cases : *Gudre Koer* v. *Bhubaneswari,* 19 Cal. 19 ; *Jogeswar Bhagat* v. *Ghaneshan,* 5 C.W.N. 356 ; *Mahamaya* v. *Ram Khelwan,* 15 C.L.J. 684 ; *Mathura* v. *Rukmini,* 17 C.L.J. 87 ; *Khetra Mohan* v. *Nishi Kumar,* 22 C.W.N. 488=45 I.C. 667 ; *B. N. Ry. Co.* v. *Rattanji,* A.I.R. 1935 Cal. 347=156 I.C. 6. Interest payable by mercantile custom [see *London, Chatham & Dover Ry. Co.* v. *South Eastern Ry. Co.*, (1893) A.C. 429], also,

is not within the term, as mercantile loans altogether stand outside the scope of the Act.

With respect to the question of *Interest* one general rule is of paramount consideration, and this is that a mortgagee, in the absence of any contract to the contrary, is entitled to treat the interest due under he mortgage as a charge on the estate, *Ganga Ram* v. *Natha Sihgn,* 51 I.A. 377=29 C.W.N. 558, P.C. Cf. *Aditya Prasad* v. *Ram Ratan,* 57 I.A. 173=52 C.L.J. 49=34 C.W.N. 625, P.C. This is so because, ordinarily, the security attaching to the principal attaches to its accessory, the intrest, Cf. *Kadar Miya* v. *Chandmiya,* A.I.R. 1923 Nag. 181. In respect of interest charged on mortgaged property, the law of this country does not make any distinction between interest payable in money or in kind, *Nilmoney Sinha* v. *Hardhan Das,* 2 I.C. 111 (Cal.).

Sub-section (9) : **Lender :** Any person who advances a loan to a borrower, will be a lender. As a loan under sub-section (12) means an advance both of money and in kind, it necessarily follows that a lender will include both a money-lender and a kind-lender. Under section 3 (32) of the Bengal General Clauses Act (1 of 1899, B.C.) the term "person" includes a company or an association or body of individuals whether incorporated or not. Therefore, banks (scheduled and notified) co-operative societies, insurance companies and other mercantile concerns could rank as lenders under this Act, but for the exemption made in favour of these bodies in clause 12 (d) of this section, *vide infra.* The word person will include a female. Cf. Section 14 of the Bengal General Clauses Act (I of 1899, B.C.).

A kind-lender is not affected by the prohibition contained in section 40 (3), *post.*

It should be noticed that the term "lender" does not include his "legal representatives" or "successors-in-interest". This will be apparent if we compare sub-sec. (9) with sub-sec. (2) which contains the definition of the term "borrower". It may include an "assignee", see sec. 29, *post*

Sub-section (10) : **Licence :** It literally means a power or authority to do some act which without such authority could not lawfully be done. Section 8 of the Act makes provision for the issue of licence to auhorise a person to carry on the business of money-lending. It is this licence that has been referred to by this definition. A licence which has not been granted under this Act is not within the contemplation of this definition.

Sub-section (11) : **Life Assurance Company :** This expression in this Act is to be understood in the sense which has

been assigned to it in the Indian Life Assurance Companies Act (VI of 1912). Section 3 of the said Act says that all persons or bodies of persons, whether corporate or unincorporate, whensoever or wheresover established will be known by this name, if they carry on life insurance business within British India.

Sub-section (12) : **Loan :** Is an advance, whether of money or in kind, made on condition of repayment with interest. From this definition it is clear that the Act contemplates loan of both money and goods. In this respect this Act materially differs from the Bengal Money-Lenders Act of 1933, which is restricted only to loans *of money* and does not apply to loans *in kind,* see *Amiruddin* v. *Radharani,* 41 C.W.N. 181. The word "money" has been described in Hasbury's *Laws of England,* [Vol. xxi, p. 36] as the means whereby the medium of exchange or the comparative values of different commodities is ascertained. Such medium may consist of tokens or coins, which, in a narrower sense are called "money". At another place in the same book, it is spoken of as that form of wealth or credit which is transferred from one person to another by means of coins, bank-notes, cheques and other similar instruments. In this latter broad sense, the word, "money" has been used in the present sub-section (12). This sub-section is not restricted to coins and bank-notes. Government currency notes are moneys as understood here and not goods. Cf. *Emperor* v. *Joggessur,* 3 Cal. 379; also *Re Mathur Lalbhai,* 25 Bom. 702; "money" here includes cheques also. Comp. *Timmins* v. *Gibbins,* (1852) 18 Q.B. 722; *Leeds & County Bank* v. *Walker,* (1883) 11 Q.B.D. 84. The word "money" in this sub-section seems to have been used in the very same sense, in which the term has been used in Art. 57 of the Indian Limitation Act. Government securities are not moneys within the meaning of that Article, [*Kristo Kamini* v. *Administrator General of Bengal,* 7 C.W.N. 476, s.c. on appeal 31 Cal. 517], and are also not moneys as understood in this sub-section. In order to determine whether an advance (whether of money or in kind) is a loan or not, it is of the utmost importance for the Court to find out whether the borrower received the advance *on condition of repayment with interest.* A mere condition of repayment does not make the advance a loan, unless at the same time there was the condition to pay interest. Advances without any understanding for payment of *interest* are not loans for the purposes of this Act. Thus, a friend accommodates another friend with a loan of money which the latter undertakes to pay at a certain time but without interest; such a loan will not come under this clause. An **accommodation loan** with

a stipulation for payment of interest, however, falls within the scope of the present definition and may be affected by the restrictive provisions of this Act, if the lender is also a money-lender as understood in this Act. When a loan is made repayable in the first instance without interest, but with a stipulation that in the event of default in payment on the due date, interest has to be paid, the case falls within the scope of this Act, because the requirement as to payment of interest is fulfilled. It may incidentally be pointed out here that stipulation for payment of interest in default of punctual payment is not necessarily by way of penalty within the meaning of section 74 of the Contract Act, if the rate of interest charged does not exceed the statutory limit of section 30, *post*. Comp. *Miajan* v. *Abdul*, 10 C.W.N. 1020; *Khargaram Das* v. *Ram Sankar*, 42 Cal. 652=21 C.L.J. 79=19 C.W.N. 775=27 I.C. 815; *Abdul Majeed* v. *Khirode*, 42 Cal. 690=19 C.W.N. 809=29 I.C. 843. Sometimes, loan transactions may be put in the garb of sale deeds with conditions of repurchase for larger sums than the actual prices, just to cover high rates of interest. [See *Khagendranarayan* v. *Dwarka Prasad*, 78 I.C. 588; *Bengal Indigo Co.* v. *Raghubar Das*, 23 I.A. 158=24 Cal. 272=1 C.W.N. 83, P.C.].

Loans in the garb of hire-purchase agreements.

In such cases, the Court will unmask the camouflage transactions and bring them within the operation of this Act, by treating them as loans *simpliciter*. In England, in order to avoid the effect of the Bills of Sale Act, a peculiar method is adopted; the borrower effects a transfer of some chattel to the lender for a price and then enters into an **hire purchase agreement** for repurchase of the very same chattel on a rental basis by a number of periodical payments covering both the original amount of the price and a sufficient *return* thereon. Such transactions though in the garb of sales are intrinsically loans and will be treated as such for the purposes of this Act. The *price* is the amount of the loan and the excess payment in instalments is the interest. As to the effect of an omission to set out the date of repayment and dates of payment of interest in a memorandum of loan in contravention of section 6 (2) of the English Money-lenders Act, 1927, see *Simmons* v. *Russell Financiers*, (1934) 3 K.B. 487.

N.B.—The word "loan" has been defined in this Act almost in the same terms as has been done in section 2 (2) of the Usurious Loans Act, (X of 1918).

Money-lending and kind-lending have been put in this subsection in the alternative by means of the word, "or"; so it will

be quite a sensible contention to say that a loan partly of money and partly in kind is not within the contemplation of the definition. The *entire* loan may be advanced at a time or in different instalments at different times; see section 13 (1), *post*, which contemplates the advance of a *part* of a loan at one time. Although, payment of interest is the *sine qua non* of a loan, still certain advances carrying interest have been excluded from the category of loans for the purposes of this Act. These are—

Exceptions, that is, what are not loans for the purposes of this Act.

(*a*) Deposits of all descriptions, whether of money or of other property, and whether in a Post Office Savings Bank or with the ordinary Banks or with companies or co-operative societies, or with a private individual. Read the notes under the heading "Deposit" at p. 31, *infra*.

(*b*) loans to, or by, or a deposit with, any society or association registered under the Societies Registration Act, 1860 or under any other law relating to public religious or charitable objects.

(*c*) loans taken or advanced by any Government in British India or by any local authority in Bengal (such as Municipalities, District Boards or Port Trusts etc.)

(*d*) loans whenever advanced, that is, whether before or after the commencement of this Act (1) by a bank which was a scheduled bank on the 1st January, 1939 or which has been declared to be a notified bank (irrespective of the question whether or not it was a scheduled bank or declared to be a notified bank, as the case may be on the date of the loan), and (ii) by a Co-operative Life Insurance Society, Co-operative Society, Insurance Company, Life Assurance Company, Mutual Insurance Company, Provident Insurance Society or Provident Society or from a Provident Fund,

(*e*) advances made on the basis of negotiable instruments (under the Negotiable Instruments Act, 1881) other than a promissory note; read notes under sec. 30, *post*.

(f) commercial loans as defined in section 2 (4)

(g) loans advanced for the purchase or construction of houses in Calcutta as defined in section 3 (11) of the Calcutta Municipal Act, 1923 or in any mafussil Municipal town, existing or future, and re-

payable by instalments extending over a period of ten years or more. Loans for purchase of building sites *only* are not outside the Act.

(*h*) loans made to or by the Administrator-General and Official Trustee (of Bengal) or the Commissioner of Wakfs or the Official Assignee or the Official Receiver of the High Court of Calcutta.

(*i*) a loan or debenture in respect of which dealings are listed on any Stock Exchange.

The several kinds of loans specified in the nine clauses (a) to (i), are excluded from the operation of this Act. The deposits, as seen above, are not loans even when made with private individuals and even if they carry interest. As to the distinction between a deposit and a loan, *vide* under the heading, "Deposit" at p. 31, *post*. If the so-called deposit is a mere camouflage for a loan, it will not go out of the operation of the Act ; the Court will always be entitled to scrutinise the real character of the transaction and if it finds that the transaction is a mere cloak for, or is *in substance,* a loan, it will apply the provisions of the Act to it. It will be noticed from the several clauses that the loans taken from the Government and certain other public institutions, and officers, and companies and societies are not within this Act. It should also be noticed that a distinction has been made between the Government and the Registered Societies and the officials like the Administrator-General, Official Assignee and Commissioner of Wakfs on the one hand and the Banks and the Co-operative Societies and the Insurance concerns on the other. In the case of the former, loans *to* or *by* the respective bodies are outside the Act, while in the case of the latter it is only the loans *by* (and not *to*) them that are exempted. Therefore, where the Banks or co-operative societies and Insurance societies are the borrowers, the Act may apply ; but that will not be the case in the cases contemplated in the clauses (b), (c) and (h) of sub-sec. (12). Under sec. 60 of the Bengal Wakfs Act, 1934, the Commissioner of Wakfs has been accorded power to borrow money and under the said section he is bound to repay the money borrowed together with any interest due in respect thereof, but the provisions of this Act will not apply in relation to such loans. Loans on the basis of negotiable instruments with one exception, namely, pro-notes stand outside the Act. Commercial Loans have already been dealt with, *vide* p. 20, *ante*. Loans for purchase of, or for construction of, houses (and not building sites alone) in Calcutta or Mafussil Municipal towns (in existence at present or likely to come into existence in future) and repayable in instalments spread over ten years or more, are

excluded from the operation of the Act. Under clause (i) loans and debentures in respect of which dealings are transacted on the Stock Exchange are excluded from the operation of the Act. This clause, it has been reported, was intended for the benefit of a certain European concern advancing huge money in the shape of debentures to a local zemindar. Any how whatever might have been the object, it will benefit all debentures quoted in the share market.

Rent paid in advance : According to some cases, it has been held that rent paid in *advance by* a tenant to his landlord is to be regarded as a loan [*Tilokchand* v. *Beattie,* 29 C.W.N. 953=A.I.R. 1926 Cal. 204=94 I.C. 538 ; also *DeNicholls* v. *Saunders,* (1870) L.R. 5 C.P. 589] ; but this does not mean that such advance payment of rent becomes a *loan* for the purposes of this Act, because in such a case there is no question of ***repayment with interest.*** The advance rent is ***treated as a loan*** for certain purposes no doubt, but it loses its character as a loan the moment the rent becomes due, irrespective of any question of *repayment.*

Deposit : Clause (a) of sub-section (12) makes a distinction between a loan and a deposit. As to what circumstances make a transaction a deposit, consult *Dorabji* v. *Mancherji,* 19 Bom. 352—affirmed on appeal in *Mancherji* v. *Dorabji,* 19 Bom. 775 ; *Govind Chintaman* v. *Kachubai,* 25 Bom.L.R. 503=A.I.R. 1924 Bom. 28=73 I.C. 978 ; *Bala Buer* v. *Inder Kumar,* 15 Pat. 709=A.I.R. 1936 Pat. 539=165 I.C. 593. A deposit may carry interest, as for example, a "fixed deposit", and yet may not be a loan. Cf. *Bank of Upper India* v. *Arip Hossain,* 1930 A.L.J. 1157=A.I.R. 1931 All. 59= 128 I.C. 772. One distinction between the two is that in the case of a loan, it is ordinarily the duty of the debtor to seek out the creditor for the purpose of repayment, but in the case of a deposit, it is the duty of the depositor to go to the depositee for the money (or the goods). *Gurcharan Das* v. *Ram Rakha,* 39 P.L.R. 377=A.I.R. 1937 Lah. 81=171 I.C. 506. In this connection, read, generally, *Mahomed Akbar Khan* v. *Attar Singh,* 63 I.A. 279=63 C.L.J. 541=40 C.W.N. 997=A.I.R. 1936 171=162 I.C. 454 (P.C.).

Proof of Purpose of Loans : The purpose for which a loan has been given has an important bearing on the question whether the loan will come within the purview of this Act. If the purpose of the loan is mentioned in the document itself, there is no difficulty in the matter of proving it, because the document itself will be the conclusive proof of the object of the loan [*vide* section

91 of the Ind. Evidence Act], and the parties to it will be precluded from contradicting the terms of the document both by section 92 of the Evidence Act and the doctrine of Espoppel by deed. If the document evidencing the loan is silent as to its purpose, oral evidence may be adduced to show the same, *Kistur Chand Tewari* v. *Rajani Kanta,* 70 C.L.J. 201. Along with this note read also the notes at p. 22, *ante,* under the heading, "Proof of Commercial Loan," in which case the *recitals* do not count.

Limitation : A suit for money payable for money lent is governed by Art. 57 of the Indian Limitation Act. A suit on a promissory note payable on demand is governed by Art. 73 of the said Act, under which the period of limitation is three years from the date of the note. If the pro-note is accompanied by a security bond hypothecating certain properties, the period of limitation may get extended by reason of the security bond, *Beni Madho* v. *Mahomed Ishrat Ali,* A.I.R. 1932 Oudh, 286=140 I.C. 460.

Sub-sec. (13) : **Money-lender :** is the person who carries on the business of money-lending. The term "business of money-lending" has been defined in the next clause, that is, clause (14) of this section, as the business of advancing loans either solely or in conjunction with any other business. Reading this clause with that clause it is apparent that the Act is meant for the *professional* money-lenders only. If the business of money-lending is carried on along with other commercial pursuits, still the person carrying it on will be a money-lender; or in other words, if a person does money-lending business, he will not cease to be a money-lender simply because money-lending is not his only business. *Vide* notes under the next sub-section. A money-lender who carries on his operations outside the Province of Bengal is not within the purview of this Act; but a money-lender who has a place of business within this province, will not go out of the operation of this Act, simply because his operations extend beyond the province. A money-lender who has a place of money-lending business outside the Province may still be a money-lender within the meaning of the Act if he has place of business in Bengal, irrespective of the question of the volume of business he does in Bengal. It is the existence of the place of business and not the *volume* of work that determines whether a person is a money-lender or not. Or, in other words, it is the venue of operations and not their quantum that is the deciding factor of the status of the person concerned. A **pawnee** who has accepted a bailment of goods under sec. 172 of the Indian Contract Act, 1872 is a money-lender as defined in this clause.

This clause will not apply to the case where the lender and borrower though residents of Bengal have stipulated that the money will be repaid outside the province and the lender on the basis of that stipulation institutes a suit in a Court outside Bengal, Cf. *Hamlyn* v. *Talisker Distillery,* [1894] A.C. 212. In such a case, the *lex fori* (the law of the place of trial) will apply and not the *lex loci contractus* (that is, this Act). Read the notes at p. 7, under the heading "Conflict of Law". Such a contract is not void under sec. 23 of the Contract Act, and the framers of the Act have not shown enough foresight to meet this case by declaring such contracts void. Of course, if the lender institutes his suit on the basis of the borrower's residence, under sec. 20 of the C. P. Code, there will be no difficulty. If a borrower is desirous of preventing the lender from taking the case out of the operation of this Act, the best course open to him will be to start the legal machinery prescribed by secs. 38 and 39 of this Act before the lender has succeeded in stealing a march over him.

N.B.: Compare the definition of the term, "Money-lender" as given in this sub-section with that given in sec. 6 of the English Money-lenders Act, 1900 (63 and 64 Vict. c. 51) which has defined the term in the following language: "Every person (excepting those herein-after specified) whose business is that of money-lending or who advertises or announces himself or holds himself out as carrying on that business is money-lender". Here the question arises whether the word "money-lender" as used in Item 27 of the second Legislative List (i.e. the Provincial Legislative List) in Sch. VII of the Government of India Act, 1935, which read with sec. 100 of that Act authorises a Provincial Government to make laws relating to money-lenders, has been used in the above sense of the term (i.e. in the sense in which it has been used in the English Money-lenders Act, 1900). Ordinarily, a legal term is to be understood in the same sense in all the statutes in which it occurs. In an English case [*Queen* v. *Linch* & *Jones,* (1898) 1 Q. B. 61], two persons were indicted under section 7 of the Conspiracy & Protection of Property Act, 1875 and the defence raised the contention that the word "Seamen" as used in the said statute did not mean "Seamen" as defined in the Merchant Shipping Act. Lord Russell of Killowen C. J. in over-ruling this contention observed as follows, "In construing an Act of Parliament, however, it is necessary to enquire into the intention of the Legislature giving just effect to the language employed, having regard to the object in view, and taking into account other Legislation bearing upon the question." This observation may be cited in support of the contention that the term "Money-lender" in the English

Money-lenders Act, 1900, and in the aforesaid Item No. 27 meant the very same thing and therefore it was *ultra vires* of the Bengal Legislature to define anew the term "Money-lender" in this Act in a different phraseology. This contention may, however, be repelled by two arguments: (i) The definition in the English Money-lenders Act, 1900, was limited to that Act and did not extend to the Government of India Act, 1935, within the meaning of the rule in *Queen* v. *Linch & Jones, supra* : (ii) In point of fact there is no repugnancy between the English sense of the term and its Bengal sense.

If the term "Money-lender" can include a Hindu undivided family : The term means a person who carries on the business of money-lending etc. The word, "person" has been defined in sec. 3 (32) of the Bengal General Clauses Act (1 of 1899), where it is said to "include any company or association or body of individuals, whether incorporated or not." A joint Hindu family bringing money-lending within the scope of its joint family business is an unincorporated body of individuals who can be called a "person" within the meaning of the aforesaid section of the Bengal General Clauses Act and can, therefore, come within the definition of "money-lender" as given here. In the Bihar Money-lenders Act, 1938 [See its sec. 2 (g)], the term "money-lender" has been so defined as to include a Hindu undivided family and in the Bengal Legislative Council an attempt was made to include a Hindu joint family within the scope of the definition of money-lender on the lines of the Bihar Act by means of an amendment, but as the Bengal General Clauses Act was sufficiently expressive on the point, the proposed amendment was thought unnecessary.

Money-lending business in partnership : As seen under the last heading, the word "person" in the clause includes a body of individuals; therefore, it is quite permissible for a group of persons to form a firm of partners [See sec. 4 of the Indian Partnership Act, (Act ix of 1932)] and carry on a money-lending business in the firm name. In such a case the licence under sec. 7, *post* should be issued in the name of the firm.

If money-lender includes his successor-in-interest : Under section 2(2), the term "borrower" has been made to include his "successor-in-interest" ; but such is not the case with the term "money-lender" as defined in this clause. Therefore, *in this Act* [see the opening words of section 2], the word *money-lender* will not include his successors-in-interest, such as his heirs, legal representatives, trustees, executors and administrators. Read the notes under section 13, *post*. For the purposes of certain sections,

the expression "money-lender" includes his assignee; see section 13(5). Under section 29, *post,* certain rights of the money-lender enure to the benefit of his assignee. What has been said above should not however be understood to restrict the rights of the heirs and legal representatives of the money-lender under the general law of the Province or under section 146 of the Code of Civil Procedure.

Sub-sec. (14) : **Money-lending business :** The term means the same thing as, and is synonymous with, the expression, "business of money-lending". The *business* of advancing loans is money-lending business, and may be carried on *solely* or in conjunction with any other business. "Anything which occupies the time and attention and labour of a man *for the purpose of profit,* is business", [per Jessel M. R. in *Smith* v. *Anderson,* 50 L. J. Ch. 43=15 Ch. D. 258] ; in this case it has also been observed that "a man who has to invest, the object being to obtain his income, invests his money, and he may *occasionally* sell the investment and buy others, but he is carrying on a business." Therefore, one or two isolated or occasional acts of lending money will not constitute a money-lending business. Unless there is an element of *continuity* or *system* in the matter, it does not become a *business.*

Sub-sec. (15) : **Prescribed :** means prescribed by rules made *under this Act.* The rules are to be made by the Provincial Government and the necessary authority for this rule-making power is furnished by sec. 44 of the Act. Read the notes under that section. Speaking broadly, it may said that the word "prescribed" may be taken as equivalent to "as provided for or laid down in the Rules." The use of the word "prescribed" in the Indian statutes is of recent origin.

Sub-sec. (16) : **Principal :** The principal amount of a loan is the *actual* amount that is advanced to a borrower on condition of repayment with interest. It is the *actual* amount that has been advanced and not the amount mentioned in the document or deed relating to the loan that will be regarded as principal of the loan. Read in this connection the notes at pp. 31-32, *ante.* The definition as given here contemplates only the money-loans and not the loans in kind, because the word "amount" can be used only in relation to money and not in relation to goods, with reference to which the appropriate word will be "quantity." For the purpose of computing interest on decretal money under clause (b) of sec. 31, it is the principal amount adjudged by the Court and not the amount actually advanced, that is taken into account. In respect of loans in kind the principal of the loan is the money

value of the commodity, loaned out, ascertained with reference to the date and place of the loan; *vide* sec. 32, *post*. As to the effect of misstatement of principal in a memorandum of loan under the English Money-lenders Act, 1927 (secs. 6 & 15), see *Dunn Trust* v. *Feetham*, (1936) 1 K. B. 22=105 L. J. (K. B.) 52=154 L. T. 53.

Sub-sec. (17) : **Provident Fund :** In sec. 2 (e) of the Provident Funds Act (xix of 1925), the expression has been thus defined: "Provident Fund" means a fund in which subscriptions or deposits of any class or classes of employees are received and held on their individual accounts, and includes any contributions*** and any interest or increment accruing on such subscriptions, deposits or contributions under the rules of the Fund. It is in this sense that the expression has to be understood in this Act also.

Sub-sec. (18) : **Provident Insurance Society :** In sec. 2 (8) of the Provident Insurance Societies Act, (v of 1912), the expression has been thus defined: "Provident Insurance Society" means any person who, or body of persons whether corporate or unincorporate which, receives premiums or contributions for insuring money to be paid on the birth, marriage or death of any person or on the happening of such other contingency or class of contingency as may be prescribed. It is in this sense that the expression has to be understood in this Act also.

Sub-sec. (19) : **Register :** Is the Register of licensed money-lenders maintained by the Sub-registrar under sec. 7 in conformity with the Rules made under sec. 44 of the Act.

Subsec. (20) : **Scheduled Bank :** Under sec. 2 (e) of the Reserve Bank of India Act (II of 1934), a "scheduled bank" means a bank included in the second Schedule of that Act; it is in this sense that the expression has to be understood in this Act also ; but banks scheduled since 1st January, 1939, should be left out of account. The following is a list of the Scheduled Banks.

Ajodhia Bank, Fyzabad.
Allahabad Bank.
American Express Company Incorporated.
Banco Nacional Ultramarino.
Bank of Baroda.
Bank of Behar.
Bank of China.
Bank of Hindusthan, Madras.
Bank of India, Bombay.
Bank Taiwan.
Bank of Upper Burma.
Benares Bank.
Bengal Central Bank.
Bhugwan Das & Co., Dehradun.
Calcutta Commercial Bank.
Calcutta National Bank, Calcutta.
Canara Bank.
Canara Banking Corporation.
Canara Industrial & Banking Syndicate.
Central Bank of India.
Chartered Bank of India, Australia & China.
Comilla Banking Corporation.
Comilla Union Bank.
Comptoir National d'Escompte de Paris.
Devkaran Nanjee Banking Co., Bombay.

Eastern Bank.
Grindlay and Company.
Hongkong and Shanghai Banking Corporation.
Imperial Bank of India.
Indian Bank, Madras.
Indo-Commercial Bank.
Indian Overseas Bank.
Industrial Bank of Western India, Ahmedabad.
Jwala Bank Ltd., Agra.
Karnani Industrial Bank.
Lloyds Bank.
Mercantile Bank of India.
Mitsui Bank, Bombay.
Mohaluxmi Bank.
Nadar Bank.
Nath Bank.
National Bank of India.
National City Bank of New York.
Nedugandi Bank, Calicut.
Netherlands India Commercial Bank, N.V.
Netherlands Trading Society.
New Citizen Bank of India.
New Standard Bank.
Noakhali Union Bank.
Oudh Commercial Bank.
Oversea Chinese Banking Corporation.
Palai Central Bank.
Pioneer Bank, Comilla.
Punjab and Sind Bank, Amritsar.
Punjab Co-operative Bank, Amritsar.
Punjab National Bank, Lahore.
Simla Banking and Industrial Company.
Thomas Cook and Sons.
Union Bank of India, Bombay.
U. Rai Gyaw Thoo and Co., Akyab.
Yokohama Specie Bank.

Sub-sec. (21) : **Suit :** The word "includes" in the clause shows that the term should, in the first place, be understood in its ordinary sense and then in the extended sense given to it by this definition. The term "suit" has nowhere been defined; sec. 26 and O. iv, r. 1 of the Code of Civil Procedure simply provides that a suit shall be instituted by the presentation of a plaint. So, in order to determine whether a certain proceeding before a Court is or is not a suit, the proper test will be whether it has been commenced by the presentation of a plaint. Another test will be whether it is capable of terminating in a decree, see sec. 2 of the C. P. Code. In *Venkata* v. *Venkatarama,* 22 Mad. 256, at p. 257, it has been thus observed : "the term suit is a very comprehensive one. It is understood to apply to any proceeding in a Court of Justice by which an individual pursues that remedy in a Court of Justice which the law affords him. The modes of proceeding may be various, but that if a right is litigated between parties in a Court of Justice the proceeding by which the decision of the Court is sought is a suit." An *appeal* is a continuation of the suit and is virtually a stage therein [See *Faizunnessa* v. *Golam Rabbani,* 62 Cal. 1132 (1136); also see sec. 52 of the T. P. Act] and in this view, there was hardly any necessity for the provision contained in this sub-section, but as in some statute [e.g. the Ind. Limitation Act, sec. 2 (10)], "suit" has been expressly said not to include an appeal and as sec. 52 of the T. P. Act is limited to cases of immoveable property only, the Legislature thought it fit to specifically mention in this sub-section that a suit will include an appeal, so that no controversy may arise in the matter. The inclusion of an *appeal* within the

scope of the term "suit" is calculated to produce a momentous result in relation to the next sub-section, *viz.,* sub-section (22). Under that sub-section the provissions of this Act apply to a suit instituted on or after 1st January, 1939, or pending on that date. So, the effect of inclusion of an appeal in a *suit* will be that this Act will apply even when the suit was instituted before 1st January, 1939, but an appeal therefrom is pending on that date. The word "appeal" evidently does not mean or include a revision [Cf. *Meghmala Debi* v. *Saday Purhya,* 68 C. L. J. 261=42 C.W.N. 1051=A. I. R. 1938 Cal. 557=179 I. C. 40; *Baksho* v. *Piaro,* A. I. R. 1920 Sind 120=80 I. C. 456], still the pendency of a revision case arising out of a suit on 1st January, 1939 would attract the operation of the Act to the case, as a revision proceeding is undoubtedly a *proceeding* within the meaning of sub-sec. (22), unless, of course, the extreme view is taken that the word "proceeding" in said sub-sec. 22 means only such an original or initiative *proceeding,* as has been contemplated in sec. 141 of the C. P. Code. Anyhow, if the objective of the revision application, be not one of the several things mentioned in the clauses (a), (b) and (c), the position may be different.

Sub-sec. (22) : **Suit to which the Act applies :** This expression means any suit (including an appeal therefrom) or proceeding instituted on or after 1st January, 1939, or pending on that date and includes a proceeding in execution, provided the object of such suit or proceeding is one or other of the several things mentioned in clauses (a), (b) and (c) of the sub-section, as hereunder shown—

(*a*) for the recovery of a loan advanced before or after the commencement of this Act.

(*b*) (i) for the enforcement of an agreement entered into whether before or after the commencement of this Act, whether by way of settlement of account or otherwise.

(ii) for the enforcement of security taken in respect of the loan, whenever advanced.

(c) for redemption of the security for the loan.

The expression "suit to which this Act applies" also occurs in sec. 2 (3) of the Usurious Loans Act, 1918. The provisions of that Act before it was amended in 1926 by Act XXVIII of 1926 applied to suits for the recovery of a loan or for the enforcement of any security or agreement in respect of a loan. Thus, that Act before 1926 was limited in its operation only to suits *brought by the creditor* and did not extend *to a debtor's suit.* It was only in 1926, that a

redemption suit (which is a debtor's suit) was brought within the scope of the Usurious Loans Act, 1918. Under clause (c) of the present sub-section (22), too, the suits for the redemption of the security for a loan have been brought within the purview of this Act; therefore, the present Bengal Act equally applies to a *creditor's* and a *debtor's* suits. It has thus been brought into line both with the English Money-lenders Act, 1900 and the amending Act of 1926 above referred to.

A suit instituted before the passing of this Act will be amenable to the provisions hereof, if it was instituted on or after 1st January, 1939, or was pending on that date. A suit (including the execution proceedings following in its wake) finally disposed of before that date will not fall within the scope of this definition. A suit *pending* in appeal or revision on 1st January, 1939, satisfies the requirements of the statute. When the proceeding contemplated in the sub-section is a *revision,* the limitations indicated in the notes under sub-section 21 should be attended to. The term "proceeding" is wide enough to include also a *review.*

A proceeding in execution has been included within the scope of the expression "suit to which this Act applies." So if the execution proceeding arising out of a suit, the objective of which is either to recover a loan or to enforce an agreement relating to a loan or to redeem a security given for a loan, is pending on or after 1st January, 1939, the suit will become amenable to the provisions of this Act. Under sec. 52 of the T. P. Act, the pendency of a suit includes its execution stage, but as the suit in question may not always involve a claim to *immoveable* property, the rule of pendency enacted in said sec. 52 of the T. P. Act may not always be available to prolong the life of suits contemplated herein, up to the stage of execution. That is why express provisions have been made here to cover up the execution proceedings within the suit. The inclusion of an appeal [See sub-sec. (21)] or an execution-proceeding or other proceedings within the meaning of the expression "suit to which this Act applies" brings many suits instituted long before 1st January, 1939 within the scope of the Act. It will be seen from sec. 36 (6) (a) *post,* that there a suit instituted long before 1st January, 1939 and terminating in a decree before that date has been contemplated as being one to which this Act may possibly apply. In this connection the *Explanation* to sec. 36 (1) should not also be lost sight of. On getting scent of this measure (when in contemplation) many creditors hurriedly started suits and proceedings to get out of this Act. The present antedating of this Act is intended to bring all those cases within its scope.

A suit by the **assignee** of a money-lender *for the recovery* of *the loan* falls within the scope of the above definition. [Consult sec. 28 (1) and 13(5), *post*]. For the purposes of sec. 36 the expression, "suit to which this Act applies," will include an application in a bankruptcy proceeding for entering a debt in the schedule of debts. An application for entering a debt in the Schedule is made in the Mafusil under the provisions of sec. 33 of the Provincial Insolvency Act, 1920, and that in the Metropolis is made under the provisions of secs. 46 and 48 of the Presidency Towns Insolvency Act, 1909, read with the rules contained in the Second Schedule thereof.

Unless the suit be for one of the three purposes, mentioned in the clauses (a), (b) and (c) of the sub-section, no question of the application of the Act to it arises. Clause (a) contemplates the case of a simple suit for the recovery of money. Such a suit must necessarily be a creditor's suit. A debtor's suit for *refund* of money in the event of over payment or double payment or a borrower's suit for relief under sec. 36 (1) is not a suit for recovery of loan and must necessarily stand outside clause (a). Clause (b) contemplates the case where the lender and the borrower settles the account between them and comes to an agreement as to the mode of payment of the amount settled as due or comes to some other understanding or arrangement or where the borrower gives fresh security for the loan and thereupon the lender thereafter institutes a suit for the enforcement of the agreement concluded or the security given. Such a suit may come within the scope of the "suit to which this Act applies" if the other requirements of sub-section (22) are complied with. It is immaterial for the purposes of clause (b) whether the agreement in question or the security in question, is entered into or taken, as the case may be, whether before or after the commencement of this Act. The words "*so* taken" mean "taken whether before or after the commencement of the Act." Compare the phraseology of clause (c). The date of the loan also is immaterial for the purposes of this clause. Clause (c) refers to a *debtor's* suit for redemption of the security given in respect of a loan. The security may be given before or after the commencement of the Act or the loan may be incurred either before or after the Act has come in force, but that will be immaterial for the purposes of clause (c). A debtor's suit for the redemption of a security, if the other requirements of sub-sec. (22) are complied with, may be a suit amenable to this Act and this will be so irrespective of the time when the security was given or the loan was

advanced. A proceeding under sec. 26 G of the Bengal Tenancy Act is a proceeding for redemption within the meaning of cl. (c) of this sub-section. An application under sec. 26 G of the Bengal Tenancy Act proceeding on a hypothesis of automatic redemption there is no question of payment involved in it; therefore, the question of such an application falling within the scope of this Act is virtually one of academic interest only. But if the mortgagor making a composite application under sec. 26G of the B. T. Act also prays for re-opening of twelve years' accounts of all receipts from the mortgage property by the mortgagee in possession in conformity with the provision contained in Proviso (i) of sec. 36(1), *post,* and wants to limit his liability on the basis of sec. 30 (1) and (2), the proceeding may assume an aspect of practical utility; see sec. 36(4), *post.*

Sec. 26G of the Bengal Tenancy Act.

As to the date of commencement of this Act, read the notes at p. 9, *ante.*

Retrospective Operation : With respect to the question as to how far the provisions of this Act will operate retrospectively, the following outstanding principles should always be kept in view: (i) *Prima facie,* all statutes are supposed to operate prospectively only, *Doolub Dass* v. *Ramlal Thackoorsey,* 5 M.I.A. 109 (126) Read Maxwell's *Interpretation of Statutes,* 8th Ed. pp. 189-201. So, the Judicial Committee have held in *Municipal Council of Sydney* v. *Margaret Alexandra Troy,* 47 C.L.J. 284=A.I.R. 1928 P.C. 128=107 I.C. 455 (P.C.) that, *generally speaking,* a statute conferring or dealing with *substantive* rights has no retrospective operation, or in other words, a new statute deals only with the rights that are to come into existence in future and not with the existing rights. See *Delhi Cloth & C. M. Co.* v. *Income-Tax Commissioner,* 54 I.A. 421=47 C.L.J. 1=32 C.W.N. 234 (P.C.); *Colonial Sugar Refining Co.* v. *Irving,* (1905) A.C. 369; *Young* v. *Adams,* (1898) A.C. 46; (ii) If a statute wants to abrogate the existing rights, it must, in express, plain and unambiguous terms, say so; otherwise, the existing vested rights of a substantive character will remain unaffected by the provisions of the new law, *Mahomed Abbus Samad* v. *Kurban Hussain,* 31 I.A. 30 (37)=26 All. 119, P.C.; *Shiba Kali Kumar* v. *Chunilal,* 31 C.W.N. 1007=A.I.R. 1927 Cal. 748=103 I.C. 674; (iii) There is no vested right in a rule of procedure and therefore the provisions relating to rules of procedure may operate retrospectively and may apply even to pending proceedings, *Sumbholal Girdharilal* v. *Collector of Surat,* 8 M.I.A. 1 (41); see also *Rajeb Lochan* v. *Jogesh*

Chandra, 28 C.W.N. 998=A.I.R. 1924 Cal. 983=84 I.C. 705; *Janaki Nath* v. *Nirodee Baran,* 57 Cal. 148=A.I.R. 1930 Cal. 442=124 I.C. 817, but (iv) as regards matters of substantive rights, even the *pending* actions will be governed by the law in force on the respective dates of their institution; see *Maxwell,* 8th Ed., page 192; also *Hamiduddin* v. *Ramani Kanta,* 56 C.L.J. 590 =33 C.W.N. cxxiii (123); *Gosta Behari* v. *Nawab Bahadur of Murshidabad,* 35 C.W.N. 1147. (v) Even a new procedure would be inapplicable, where its application would prejudice the rights established under the old Law, *Re Phoenix Bessemer Co.,* 45 L.J. Ch. 11; *Re a Debtor,* (1936) 1 Ch. 237 (243).

With the above few first principles as a guide, the question of retro-action of the provisions of this new Act will admit of an easy solution. The words "before or after the commencement of this Act" in the three clauses (a), (b) and (c) of section 2 (22), clearly show that the intention of the Legislature has been to bring all loans whenever incurred within the operation of this Act if the suits (including appeals) for their recovery or for the enforcement of the agreements in relation to them or for redemption of the security given for them are instituted on or after the 1st January, 1939, or are pending on that date. Under section 36, *post,* it will be seen that subject to the restrictions laid down in provisos (i) and (ii) of sub-section (1) of that section, the Courts have been given power to reopen *past* transactions and give the borrower relief in respect of them. So, there are clear *express* indications in the Act itself that many of its provisions will operate retrospectively. The words "whether advanced before or after the commencement of this Act" have been used also in sections 25 (2), 28 (1) (i), 30 (1) & (2), and there also the intention of the Legislature has been to affect even the old loans.

The question of retro-action of the the provisions of the Bengal Money-lenders Act, 1933 (Act VII of 1933, B.C.), came up before the Court in a number of cases: see *Mrinalini Debi* v. *Hari Lal Roy,* 63 C.L.J. 117—referred to in *Suresh Chandra* v. *Satyendra Kumar,* 44 C.W.N. 694; *Brojendra Kumar Dutt* v. *Sushil Chandra,* 39 C.W.N. 1213 [correctness of this decision has been doubted by Cunliffe, J., in 63 C.L.J. 117, *supra*]; *Lal Mohan Routh* v. *Kunja Behari,* 41 C.W.N. 499; *Firm Hari Mohan Gobinda Chandra* v. *Amritalal Chowdhury,* 42 C.W.N. 975, and in them the point will be found mooted from various points of view. These decisions should not, however, be called in aid in deciding the question of retro-action of the provisions of this Act, inasmuch as the present Act proceeds on considerations materially different from those of the Act of 1933.

Notified Bank.

3. The Provincial Government may, by notification in the *Official Gazette*, declare any bank to be a notified bank for the purposes of this Act:

Provided that no bank shall be so declared to be a notified bank unless it complies with such conditions as may, with the approval of the Provincial Legislature, be prescribed.

Notified Bank : This section empowers the Provincial Government to declare certain banks to be "Notified Banks" for the purposes of his Act. This the Provincial Government is to do by means of a notification published in the official Gazette. In order to be entitled to be declared a *Notified Bank*, the bank in question must fulfil the conditions which the Provincial Government may, with the concurrence of the Provincial Legislature, prescribe for the purpose. Or, in other words, the fulfilment of the prescribed conditions is an indispensable pre-requisite to qualify a bank for the higher status of a *notified* bank. In laying down such conditions the Provincial Government is to see that it does not contravene any of the provisions of this Act because in the exercise of its rule-making power, the Provincial Government cannot override the statute. If it does not take this precaution, the conditions laid down by the Provincial Government may be *ultra vires* and destitute of any legal force. In drawing up rules prescribing the conditions necessary for the qualification of a notified bank, the Provincial Government must obtain the approval of the Provincial Legislature. Rules framed without such approval will be *ultra vires.* As to the meaning of the term "bank", see sec. 2(1), *ante* and the notes at p. 16. An institution which does not satisfy the requirements of sec. 2 (1) cannot be declared to be a notified bank under this section.

Under sub-section 12 (d) (i) of section 2 a loan which is advanced by a notified bank to a borrower is not a loan within the meaning of the Act and is, therefore, not within the perils thereof. As it is not within the lot of every Bank to earn the qualification of a Scheduled Bank and to be spared from the perilous operation of this Act on that account, a saving scheme has been divined in this section to spare a number of banks, which are something more than mere loan offices and do actual banking business, from being stranded in consequence of the application of this Act to them. The benefit of this scheme is not to be indiscriminately extended to all banks many of which are scarcely better than mere loan offices. It has been considered undesirable

to exclude each and every bank from the operation of the Act as that would encourage the loan offices to carry on money-lending business under the garb of banks and have all moneys from rural areas deflected towards them to the starvation of the rural money-lenders. By creating a new intermediate class of banks (called the "notified banks") between the Scheduled Banks and the loan offices masquerading as banks, but doing practically no banking business), the section has helped the banking system and has at the same time restricted the flow of money from individual lenders in rural areas to the organised group of lenders in urban areas.

CHAPTER II.

Competent Courts and Procedure.

Competent Courts under this Act.

4. Notwithstanding anything contained in any other law, the Courts (hereinafter referred to as Competent Courts) which have jurisdiction to entertain proceedings under sections 16 and 19 and to pass orders therein are the Courts hereinafter specified, within the local limits of whose jurisdiction, the money-lender *actually* and *voluntarily* resides or carries on the business of money-lending—

(*a*) in Calcutta the Court of Small Causes of Calcutta;

(*b*) outside Calcutta the Court of the District Judge (hereinafter called a "District Court") and any Court to which he may transfer the proceedings.

Competent Courts : The section declares the Courts mentioned in clauses (a) and (b) of the section to be competent Courts within the meaning of the Act. These Courts are—(1) the Presidency Small Cause Courts in the area within the limits of the ordinary original civil jurisdiction of the Calcutta High Court, compendiously called "Calcutta" in section 2 (3) ; (2) (i) The District Court, or (ii) any subordinate Court, to which the District Court transfers a proceeding, in the areas outside "Calcutta." These Competent Courts have jurisdiction to entertain proceedings in revision against the decision of a Registrar under section 16 (5)

and for cancellation of a money-lender's licence under section 19, of the Act and to pass necessary orders in such proceedings. The section creates a special jurisdiction in favour of these Competent Courts and such jurisdiction will not be affected by any of the provisions contained in the Civil Courts Act or the Civil Procedure Code. A saving provision in that behalf has been made by the opening words of the section, namely, "Notwithstanding anything contained in any other law." The Competent Courts can entertain an application for cancellation of a licence under section 19 only in respect of the money-lender who *actually and voluntarily resides* or carries on the business of money-lending within the local limits of their respective jurisdiction; that is, if a money-lender is a resident of Calcutta or if he carries on his money-lending business in Calcutta the application for cancellation of his licence should be presented to the Calcutta Presidency Small Causes Court and if he is a resident outside Calcutta or carries on his money-lending business in the moffusil, then the application under section 19 against him should be presented to the District Court of the district in which the money-lender resides or carries on business. In order to create jurisdiction in favour of a Competent Court, it is necessary that the money-lender concerned should either actually *and* voluntarily reside or carry on the business of money-lending within the local limits of the particular Competent Court in question. If jurisdiction is sought to be created by the money-lender's residence, the habitation should be *actual* "and" *voluntary*. Because of the conjunction "and", both the conditions have to be fulfilled and it is not sufficient that a money-lender *actually* resides at a place, though not voluntarily. The expression "actual residence" is used in contradistinction to constructive residence, see *Progash Paray* v. *Hachim*, 7 W.R. 417; if the money-lender does not actually reside within the jurisdiction of the Competent Court, but has only a family residence or an ancestral home within it, that will not be fulfilment of the requirements of this section, Comp. *Ugarchand* v. *Surajmal*, 2 Bom. L.R. 605; *Kishori Lal* v. *Ram Sunder*, 19 A.L.J. 822=A.I.R. 1921 All. 193=64 I.C. 688; *Gurandittamal* v. *Ram Das*, 1916 P.R. 112=38 I.C. 62 (63). The expression "actually and voluntarily resides" seems to have been taken from sections 16 and 20 of the Code of Civil Procedure and the case-law under those sections may profitably be consulted in construing the said expression as occurring in this section. In this connection reference may also be made to the expression "ordinarily resides" occurring in section 11 of the Provincial Insolvency Act, which also means very much the same thing; read *Anilabala* v. *Dhirendra*, 32

C.L.J. 314. If jurisdiction cannot be created on the strength of the money-lender's residence, then at any rate it has to be shown that the money-lender concerned has been carrying on his money-lending business within the jurisdiction of the particular Competent Court in question. Any other business than that of money-lending will not create jurisdiction under this section. But if such other business is carried on in conjunction with a money-lending business that may bring the case within the jurisdiction of the Court, see section 2(14). The jurisdiction of the Competent Courts is determined with reference to the residence or place of business of the *money-lender* and not with reference to those of the *borrower*. Jurisdiction with reference to place of business arises whether the money-lender has been carrying on his *entire* business or a *part* of his business in the locality. The question of jurisdiction hereunder has got nothing to do with the amount of the loan. It is also immaterial whether the loan business is carried on personally or through agents.

District Judge may transfer to any Court : Under clause (b) of the section, the District Judge, to whom an application under section 19 is presented, can transfer the same to any Court, *subordinate to him*. The section itself does not require that the Court to which the District Judge can transfer a case shall be a Court subordinate to him. But this follows from the fact that under section 5, the provisions of section 24 of the Code of Civil Procedure have been made applicable to the proceeding before the District Judge. The said section 24 permits a transfer only to a subordinate Court. Therefore, the power of transfer given to District Judge under clause (b) of this section must be subject to the same restriction. The Court to which a proceeding is transferred by the District Court becomes a "Competent Court" within the meaning of this section. The expression "any Court" is wide enough to cover a " Munsiff ", and therefore an application under section 19 can be transferred hereunder to a Munsiff ; but that ought not to be done, inasmuch as an order of a Competent Court has been made appealable under section 5 (2) and the appeal from the transferee Munsiff's Court will lie to the very District Court which has made the transfer. Academically speaking, there is no bar under the law to preclude such an appeal, but from the view-pont of expediency such a sort of thing ought not to be allowed to take place. There can be no apprehension of such an eventuality when the case is transferred to the Court of an Additional Judge or a Sub-Judge and the reasons for it have been given in the notes under section 5(2), *post*. That a transferee

Court of an Additional Judge, a sub-ordinate Judge or a Munsiff can be a Competent Court is apparent also from the *Proviso* to section 20(1).

Subordinate Courts become competent Courts only after a *transfer* by the District Court and therefore all proceedings should be *started* before the District Judge.

Procedure in Competent Courts.

5. (1) Subject to the provisions of this Act, a Competent Court shall, in proceedings under section 19, have the same powers and shall follow the same procedure as it has and follows in civil suits and the provisions of section 24 of the Code of Civil Procedure, 1908, shall apply to such proceedings.

(2) Every order made by a Competent Court under this Act shall be subject to appeal in accordance with the provisions of the Code of Civil Procedure, 1908, applicable to appeals.

(3) An appeal from a decision made by the Court of Small Causes of Calcutta under this Act shall lie to the High Court as if it were an appeal under sub-section (2) to the High Court from a decision made by a District Court.

Sub-section (1) : **Procedure in Competent Courts :** In dealing with an application under section 19, a Competent Court will have the same powers and shall follow the same procedure as it has and follows in civil suits. This rule is however *subject to the provisions of this Act.* This means that if the ordinary procedure of a Competent Court is in conflict with any particular provision of this Act, that provision will prevail over the ordinary procedure. It may incidentally be pointed out here that a Competent Court has also jurisdiction to entertain a revision application under section 16(5). This sub-section contains no reference to the said revisional proceeding and sub-section 6 of section 16 says that the procedure for the revision cases should be guided by the Rules framed under this Act. So the result is that in one class of proceedings the Competent Court goes by the Rules and in another class of proceedings (namely, the proceedings for cancellation of licence) it goes by the C. P. Code.

The provision of sub-section (1) of this section does not create any trouble in relation to the Competent Courts contemplated by clause (b) of section 4, namely the District Court and the subordinate Court to which the District Judge transfers a case. The

difficulty arises in relation to the Competent Court contemplated in clause (a) of secion 4, *viz.*, the Court of Small Causes of Calcutta. By reason of section 8 read with Or. LI, of the Code of Civil Procedure only a small part of the C.P. Code applies to proceedings before the Presidency Small Causes Court (of Calcutta). A substantial part of its powers and procedure is regulated by the Presidency Small Cause Courts Act (Act XV of 1882). So a question here naturally arises as to what will be the usual procedure when the Court of Small Causes of Calcutta acts as a Competent Court under clause (a) of section 4. Having regard to the phraseology of sub-section (1) of this section, the conclusion is irresistible that such a Competent Court will proceed under the provisions of the Presidency Small Cause Courts Act supplemented by so much of the provisions of the Civil Pocedure Code as have not been rendered inapplicable to that Court by section 8 and Or. II. of the Cole. This is undoubtedly an unhappy position, but there is no escape from it.

Section 24 of the Civil Procedure Code which deals with transfer of cases has been made applicable to proceedings before a Competent Court for cancellation of licence under section 19 (notice the word "such"). So far as the Calcutta Small Causes Court is concerned, no question of transfer arises in relation to it inasmuch as clause (a) of section 4 of this Act has made no provision in that behalf and further as there is no Court subordinate to the Presidency Small Causes Court to which a transfer can possibly be made. A transfer of proceeding is possible only under clause (b) of section 4 hereof. It has already been seen at p. 46, *ante,* that the effect of importation of section 24 of the Civil Procedure Code into this Act is that a District Judge can transfer a case only to a subordinate Court and not to any other Court outside his own district. Another effect of the applicability of said section 24 is that it will be in the power of the District Judge to withdraw a case from the file of a subordinate Court and retransfer it to another subordinate Court, see section 24(1)(b) of the C. P. Code. Section 24 of the Civil Procedure Code having been made applicable, Courts of Additional and Assistant Judges will be, under sub-section (3) of said section 24, deemed to be subordinate to the District Court. The power of transfer under section 24 of the C. P. Code has not been conceded in relation to revision applications under section 16(5), with the result that such revision applications cannot be transferred to a Subordinate Judge's Court, there being no provision in that behalf in the Civil Courts Act either. The District Judge's power of assigning cases to

Additional Judges under section 8 (2) of the Civil Courts Act remains all the same and therefore such revisional cases can be transferred to Additional Judges under said section 8(2).

Sub-sec. (2) : **Appeal from the order of a Competent Court :** This sub-section gives a right of appeal to a party who is aggrieved by an *order* of a Competent Court. A right of appeal under this sub-section should be exercised in conformity with the provisions of the Code of Civil Procedure relating to appeals. Sub-section (2), speaking of subjection to the appeal provisions of the Civil Procedure Code, evidently contemplates not only the Competent Courts referred to in clause (b) of section 4, namely (i) the District Court or (ii) any transferee subordinate Court but also the Competent Court referred to in clause (a) of said section 4. The appeal provisions of the Code apply to the Calcutta Small Causes Court only *mutatis mutandis.* A provision for appeal from the decision of the Calcutta Small Causes Court has been separately mentioned in sub-section (3), *post,* just to ascertain the forum of appeal. There is no difficulty as to the question of forum of appeal in relation to the other Competent Courts.

As said above, appeals from the orders of Competent Courts contemplated by clause (b) of section 4 are regulated by the appeal provisions of the Civil Procedure Code contained in Part VII (sections 96 to 112) and O.XL. 1 of the Code. Now, section 96 of the C. P. Code has been so worded that sections 20 and 21 of the Bengal, Agra and Assam Civil Courts Act (XII of 1887) have to be read into it, and the effect of this is that when the District Court itself deals with an application under section 19 of the Act, an appeal from it shall lie to the High Court [see section 20 of the Civil Courts Act, 1887]. When the District Judge transfers a proceeding to an Additional District Judge under section 3, cl. (b) of this Act read with section 24 (3) of the C. P. Code, an appeal from the Additional District Judge's order also will lie to the High Court [*Vide Ibid*]. It has been held by the Allahabad Court [see *Makhan Lal* v. *Sri Lal,* 34 All. 382=14 I.C. 162] that where an Additional Judge exercises the powers of a District Judge by virtue of an assignment of some of his functions by the latter officer under section 8 of the Bengal, N. W. P., and Assam Civil Courts Act (XII of 1887), he may not be subordinate to the District Judge for the purposes of an appeal and therefore an appeal against his order lies to the High Court, direct. When the District Court transfers the proceeding to a Subordinate Judge, then also an appeal will lie to the High Court, because an appeal from the order of a Subordinate

Appeals from the orders of Subordinate Judges.

Judge can lie to the District Court only in the contingency contemplated in section 21(1)(a) of the Civil Courts Act, 1887, and in *any other* case, an appeal from the order of a Subordinate Judge will directly lie to the High Court [see section 21 (1) (b) of the Civil Courts Act, 1887]. When a Subordinate Judge deals with an application under section 14 of the Civil Courts Act by virtue of a *transfer* under section 4, clause (b) of this Act read with section 24 of the C. P. Code, it cannot be said that he is exercising *original* jurisdiction or entertaining an *original* suit of a value not exceeding five thousand rupees; therefore his case does not come under clause (a) of section 21 (1) of the Civil Courts Act, but falls within the meaning of "any other case" mentioned in clause (b) of said section 21 (1) and consequently an appeal from the Subordinate Judge's order will lie directly to the High Court.

An appeal under this section being made to conform to the provisions of the Code of Civil Procedure relating to appeals, it should be preferred in the form of a memorandum concisely stating the grounds [See O.XLI, rr. 1-12, C. P. Code] and the other requirements as to signature or supply of copies of the orders appealed from should also be complied with. The provisions of Rules 5-6 of Or. XLI, of the Code relating to stay of proceedings also may be utilised in such an appeal.

Appeal when a case is transferred to the Munsiffs : It is quite permissible for a District Court to transfer a proceeding under section 19 of the Act to a Munsiff. The transfer of a case by the District Court to a Munsiff forms no bar to the District Court hearing an appeal from a decision made by the Munsiff in the transferred proceeding. The decision of the Munsiff in the proceeding not being a decree but being simply an order within the meaning of section 2 (14) of the C. P. Code, there will be no second appeal to the High Court, inasmuch as the appeal provisions of Part VII (sections 96 to 112) of the Civil Procedure Code apply to such appeals.

Appeals to High Court are First Miscellaneous Appeals : The appeals to the High Court under this section are all appeals from Original Orders, and therefore the Rules 33(b) (Ch. V) and Rules 67-69 (Ch. IX) of the High Court Appellate Side Rules will apply to them.

Sub-section (3) : **Appeals from the decision of Calcutta Small Causes Court :** This sub-section (3) provides for an appeal

from a decision made by the Court of Small Causes of Calcutta functioning as a Competent Court under section 4 of the Act. It says that such an appeal will lie to the High Court exactly in the same way as an appeal lies to the High Court from a decision made by a District Court. It is worthy of notice that whereas sub-section (2) uses the word "order", this sub-section uses the word "decision" in its stead; therefore, at least so far as this section is concerned, these two terms are interchangeable. An appeal from the decision of the Calcutta Small Cause Court being placed on the same footing as an appeal from the decision of the District Court, the Advocates entitled to practise on the Appellate side of the High Court shall have right to appear and act in all matters relating to such appeals. Besides, with effect from November, 1940, the restriction on the Appellate Side Advocates to practise on the Original Side of the High Court is expected to be removed as regards the Advocates of certain years' standing. So after the aforesaid date questions may not arise as to the competency of the Advocates to appear in relation to appeals hereunder.

CHAPTER III.

Registration and Licensing of Money-lenders.

Appointment of Provincial and other Registrars.

6. There shall be a Provincial Registrar for the purposes of this Act and as many Registrars and Sub-Registrars of money-lenders for assisting the Registrar as the Provincial Government may from time to time determine. The Provincial Government may define, by notification in the *Official Gazette,* the area within which each such officer shall exercise his powers and perform his duties and may prescribe the control, which shall be exercised by the Provincial Registrar over Registrars and Sub-Registrars and by a Registrar over Sub-Registrars:

Provided that no person who is not a servant of the Crown in India shall be empowered to act as a Provincial Registrar, Registrar or Sub-Registrar under this Act.

Appointment of Provincial and other Registrars: Provision has been made in this section for the appointment of a number

of officers, who are to go by the names of Provincial Registrar, Registrars and Sub-Registrars to carry out *the purposes of the Act*. There will be one Provincial Registrar over the whole Province. The Provincial Government will, from time to time, determine how many *Registrars and Sub-Registrars* have to be appointed under this section for assisting the Provincial Registrar. It will also be in the power of the Provincial Government to define, by means of a notification in the Official Gazette, the powers, duties and respective territorial jurisdictions of these officers. Section 16(3) *post*, shows that the Provincial Government can, under this section invest a Registrar with power to hear an appeal from the order of the Sub-Registrar refusing a licence under section 16. The Sub-Registrars being the lowest grade of officers contemplated by this section, the duty of maintaining Registers of money-lenders has been cast on them, under the next section (section 7). The Provincial Government has also power to make rules for control of the Registrars and Sub-Registrars by the Provincial Registrar and control of the Sub-Registrars by the Registrars. The words "assisting the Registrar" evidently mean assisting the Provincial Registrar. The power of *control* evidently includes exercise of appellate authority.

Under the *proviso* of the section, the officials to be appointed under this section have to be selected from among the servants of the Crown. The object of this provision is to utilise the services of the existing servants of the Crown for the purpose of working out the provisions of this Act, so that no additional expenditure may have to be incurred in the matter.

Under the English Money-Lenders Act, 1927, the officers, who perform the corresponding duties which are done under this Act by the Registrars and Sub-Registrars, are known as the Commissioners of Customs and Excise.

Register of money-lenders.

7. Each Sub-Registrar shall maintain in the prescribed form a register of money-lenders holding licences issued by him.

Registers of Money-lenders : This section enjoins the Sub-Registrars appointed under the last section to maintain a register of money-lenders holding licences *issued by him*. The words in italics are important as they indicate by what officers the licences to money-lenders have to be granted. Applications for grant of licences should be received, and licences granted, by the officers designated as Sub-Registrars and not by the Provincial Registrar or the Registrars. Express provisions in that behalf have been made

in sections 11 and 12, *post*. The register should not include the name of any money-lender who has not obtained a licence under this section. Such register shall be in the prescribed form. "Prescribed" means prescribed by the Rules [see section 2 (15)]. The Sub-Registrar has power under section 17 to cancel a licence granted hereunder in the circumstances mentioned in said section 17, *post*. Read the notes thereunder. It has been seen at p. 34, *ante*, that a licence can be granted to a firm of partners carrying on a money-lending business in co-partnership. Grant of licence to a firm of partners has been contemplated in Proviso (b) of section 1 (1) of the English Money-Lenders Act, 1927, *vide* Appendix A, at p. 211, *post*.

The term "Register" has been defined in section 2 (19) as a *register* of money-lenders maintained under this section. The register will evidently be a public document within the meaning of section 74 of the Indian Evidence Act, 1872.

Money-lending business not to be carried on except under licence.

8. After such date not less than six months after the commencement of this Act as the Provincial Government shall, by notification in the *Official Gazette*, appoint in this behalf, no money-lender shall carry on the business of money-lending unless he holds an effective licence.

Explanation.—An *effective licence* for the purposes of this Act comprises a licence issued to a person who is not disqualified for holding a licence.

Money-lending business without licence prohibited : The section prohibits the carrying on of money-lending business after a certain date to be fixed hereafter by means of a Government notification except under an *effective* licence granted under section 7. The date to be fixed for the purpose must not fall within six months *from* or *after* the date of commencement of this Act. As to the date of *commencement of the Act*, read the notes at p. 9, *ante*. Read also Maxwell's *Interpretations of Statutes*, 8th Edn. at p. 352. Cf. Eng. Interpretation Act, 1889, sec. 36. The date notified under this section and the date of commencement of operation of the Act are two different dates, and at least six months' time must intervene between them. In computing limitation "from" or "after" virtually mean the same thing. Carrying on of money-lending business during this interregnum of six months is not illegal. In order to be entitled to carry on a money-lending business, it is not

enough that the money-lender simply holds a licence; it is also necessary that the licence he holds should be an effective one. What has been prohibited by this section is the *carrying on of the business of money-lending*. The "business of money-lending" has been defined in section 2 (14) as the business of advancing loans either solely or in conjunction with any other business. An isolated act of money-lending is not prohibited, if it is not done with the motive of doing business. What does or does not amount to doing business has to be decided with reference to the facts of each case and no hard and fast rule can be laid down for the purpose. In every case which arises for consideration before the Court under this section, the Court will have to determine whether the money-lending in question is simply *casual* or is a part of the lender's business. An isolated act of money-lending by a person who does not hold an effective licence not being a contravention of this section, there can be no criminal prosecution in respect of it under section 42, *post*. The section does not restrict money-lending outside the Province of Bengal.

Effective Licence : The *Explanation* added to the section, in a way, defines the expression "Effective Licence". If the licence contemplated in section 7 is issued to a person who is not disqualified for holding a licence, it will be called an *effective licence*. As to when a person is to be regarded as disqualified for holding a licence, see section 14 of the Act. Under that section a person will be considered disqualified for holding a licence, if a Court has made an order under section 20 (1) (b) declaring him to be so disqualified or if a *final* order of conviction of an offence mentioned in the Schedule to this Act has been made against him. A minor's contract being altogether void, [*Mohori Bibi* v. *Dhurmodas*, 30 I.A. 114=30 Cal. 539=7 C.W.N. 441, (P.C.) ; *Raja Balwant* v. *Rockwell*, 34 All. 296=15 C.L.J. 475, P.C.] a minor is incompetent to carry on a money-lending business; and, therefore, no *effective* licence can be issued to a minor also, although his case has not been contemplated in section 14. Similarly, lunacy also will disqualify a person from holding a licence. But it would seem that an effective licence can be granted to the guardian of a minor or the curator of a lunatic if the provisions of section 14 do not present a bar. The use of the word "person" shows that a licence can be granted to a juridical person or a female. Read the definition of "Person" as contained in section 3 (32) of the Bengal General Clauses Act (I of 1899).

A minor being incompetent to hold an *effective licence*, cannot carry on the business of money-lending; and if he does so, that

will amount to a contravention of this section and will bring him within the perils of section 42, *post*. A minor's money-lending transactions during the first six months after the commencement of the Act will not however expose him to any such risk.

If the licence is not an effective one its holder is precluded, under section 13(1), from recovering a decree on his loan. A licence procured by a disqualified person by suppressing the fact of his disqualification is not an *effective* one, see section 23(1).

Under section 2 of the English Money-Lenders Act, 1927, a money-lender's excise licence granted in contravention of that Act is void. When this section says that a licence issued to a person disqualified for holding it is *ineffective,* it virtually means that such a licence, as under the English Law, is altogether void.

Licences.

9. (1) A licence shall be valid throughout the *whole of* Bengal for a period of three years from the date of its issue or until it is cancelled.

(2) On the expiration of the period for which the licence was granted or on the cancellation of a licence it shall be returned by the money-lender to the Sub-Registrar who issued it.

Term or Duration of Licence : A licence granted under section 7 remains operative throughout the whole province for a period of *three* years from the date of its issue or *until it is cancelled* (before its time). As to the meaning of the expression "the whole of Bengal", read the notes under sub-section (2) of section 1 at pp. 6-7, *ante ;* also see section 46 of the Government of India Act, 1935, in consequence of which the old definition of "Bengal" as contained in section 3(5) of the Bengal General Clauses Act, I of 1899, has since been omitted by the Government of India (Adaptation of Indian Laws) Order, 1937, Sch. IV. The period of three years referred to in this section is to be calculated according to the British Calendar [see section 3 (48) of the Bengal General Clauses Act, I of 1899, B.C.]. Under the English Money-Lenders Act, 1927, a money-lender's excise licence is granted annually expiring on the 31st of July of every year and the fee paid on the licence is £15 for a whole year or £10 for a second half year ending with 31st July. In this respect, this Act is much more lenient than the English Act. Under sub-section (2), the money-lender is bound, on the expiry of the term of his licence or upon its cancellation, to return it to the Sub-Registrar who issued it. Return of the licence is obligatory and default in this respect is an offence

punishable under section 42, *post*. The section does not say within what period after the expiry of the term of a licence or after its cancellation, it has to be returned. The requirements of the statute will be satisfied if it is returned within a *reasonable* time. If a licence is not cancelled for the reasons mentioned in section 17, it shall remain in force for a period of three years, and after the expiry of that period ; it may again be renewed. A licence being *personal* must necessarily terminate with the death of its holder. A fixed fee of Rs. 15 has been prescribed for this triennial licence, by the next section.

The licence being valid throughout the province it is possible for a money-lender registered at one place to advance loans to persons residing within the territorial jurisdiction of a sub-registrar of money-lenders of a different place. Compare in this respect the provisions of the English Money-Lenders Act, 1900 [63 & 64 Vict. 51] with those of this section. If the lender carries on his money-lending business at different places in the Province, it will not be necessary for him to take a licence from each and every Sub-Registrar within whose territorial jurisdiction these places fall. The certificate taken with reference to one place will hold good also in respect of the other places of his business.

Renewal of Licence : There is no bar to the renewal of a money-lender's excise licence for a fresh term after the expiry of the term of his old licence granted under section 7 of the Act. The fresh licence too will take effect from the date of its issue. So, necessarily, a money-lender will have to go without a licence for sometime intervening between the expiry of the term of his old licence and the issue of a fresh licence to him. So it is advisable for a money-lender to make an application for renewal in advance while his existing licence is subsisting, so that the fresh licence may be issued immediately on the expiry of the old term without any loss of time to him. The procedure will be similar to the one which the legal practitioners generally follow for renewing their professional certificate every year and will enable the money-lenders to carry on their business *continuously* without any interruption.

Licence fee.

10. There shall be paid to the Provincial Government a fee of fifteen rupees for a licence issued under this Act:

Provided that the Provincial Government may, by notification in the *Official Gazette,* remit any part of such fee either generally or for any particular class of money-lenders.

Licence Fee : A fixed fee of Rs. 15 has to be paid to the Provincial Government for a licence issued under this Act. The payment of licence fee is compulsory, as has been indicated by the word, "shall". The *proviso* to the section gives the Provincial Government a discretionary power in *reducing* this fee *generally* or in appropriate classes of cases. The Provincial Government however will have no power to remit the fee *in toto ;* it can at best only remit a *part* of the fee. The Provincial Government can remit the fee only by means of a notification in the Official Gazette. The remission of fee under this section may be made to operate *generally,* that is, in relation to all cases wihtout any discrimination, or in respect of any particular *class* of money-lenders. There cannot be any remission of fee with reference to any particular *individual* money-lender or money-lenders. The class of loans in respect to which the licence fee can be reduced may be specified with reference to the *nature* of the transactions, or with reference to the *areas* within which they are made or the *class* may be determined on any other basis.

As to the mode of payment of the fee for the licence, Rules have to be made.

The volume of a money-lenders' business has nothing to do with his licence fee.

The amount of licence fee having been fixed by the statute, it will not be possible for the Provincial Government to enhance the same except by fresh legislation. The proviso to the section has given the Provincial Govenment power to *remit* a *part* of it only ; no power has been to the Provincial Government either to enhance it or to remit it altogether. The word "may" in the proviso is only *enabling* and has given the Provincial Government a discretion in the matter. This discretion may be exercised both as regards the amount which can be remitted and the principle on which the class of money-lenders to be benefited has to be determined or defined.

Application for licences.

11. An application for the grant of a licence shall be made in the *prescribed form* and *manner* to the Sub-Registrar within the local limits of whose jurisdiction the money-lender has *a place* of money-lending business and shall contain such particulars as may be prescribed.

Form of Application for Licences : A money-lender has to present his application for the grant of a licence in the form

prescribed by the Rules. "Prescribed" always means, under section 2 (15) of the Act, prescribed by the rules made under this Act. Section 44 (2) (b) has authorised the Provincial Government to make rules in that behalf. The application is to be made to the Sub-Registrar within the local limits of whose jurisdiction, the money-lender has a place of money-lending business. If the lender carries on his money-lending business at different places he will be entitled to obtain his licence from the Sub-Registrar of any of those places. A licence will not be bad simply because the lender has taken his licence from the Sub-Registrar of a place where only a small part of the lender's money-lending business is done, and not from the Sub-Registrar within whose territorial jurisdiction greater part of his business is done. As to what particulars the money-lender's application should contain, the Rules to be framed under the Act will make provision for that. It is to be noted that the forum of the application for licence is determined with reference to any of the places of money-lending business of the money-lender and not with reference to his residence. Residence of the money-lender does not at all count in the matter. It is to be noted that when proceeding is taken *against* the money-lender, his residence may have some bearing on the question of venue of the proceeding, but in a proceeding taken *by* the money-lender, as under this section, his residence is immaterial.

Not only the *form* of the application, but also the *manner* in which the application for licence is to be made has to be prescribed by the Rules to be framed by the Provincial Government by virtue of the power conferred by Sec. 44, *post*. The *manner* in which the application for licence is to be made refers to the questions as to how it has to be signed, whether it has to be verified, by whom it has to be presented, whether it can be presented through a legal practitioner or any other authorised agent, or it has to be presented by the applicant in person and so forth. So long as rules are not framed under the Act in that behalf applicants may adopt the ordinary procedure for the presentation of applications before the Civil Court. But when rules will be framed, the applicants will have to conform to them, other-wise their applications will stand the risk of being refused under the provisions of Sec. 16 (1) (a), *post*. An applicant for licence is bound to conform to the rules if framed, because compliance with the requirements of this section has been made obligatory by the use of the word "shall" in this section.

Plurality of Licences : The section does not prohibit a person from carrying on different registered money-lending businesses

under different names. A money-lender may have one business in his own name at one place and may have another business in a firm name along with other partners at another place, and licences under this section have to be granted accordingly. In this respect this Act deviates from the English practice in the matter, See *Whiteman* v. *Sadler*, [1910] A. C. 514.

Effect of non-compliance with the requirement of the section : If the money-lender's application for licence is not drawn up in the proper form or if it does not contain the necessary particulars required by the Rules, the Sub-registrar before whom it is presented may reject the same and refuse to grant the licence prayed for, *vide* sec. 16 (1) (a), *post.*

Dismissal of an application for non-compliance with this section does not bar a fresh application in proper form and manner : If an application for licence is dismissed under section 16 (1) (a) for disregard of the rules as to its form and manner as required by this section, the applicant will not be debarred thereby from making a fresh application in the correct form and manner. The dismissal of an application is simply a penalty for remissness on a particular occasion, and does not entail any disqualification on the applicant for all time to come.

Entry in register and grant of licences.

12. On receipt of an application under section 11 and on payment in the prescribed manner of the licence fee specified in section 10, the Sub-Registrar shall, subject to the provisions of section 16, enter the name of the applicant in the register and grant the applicant a licence in such form as may be prescribed.

Entry of the money-lender's name in the Register and grant of Licence : When an application for licence under section 11 has been made and and the fee prescribed by section 10 has been paid, the Sub-Registrar should grant the petitioning money-lender's prayer unless he thinks that for any of the reasons mentioned in section 16, he should refuse it. This section requires the Sub-Registrar to act *subject to the provisions of section* 16. This means that section 16 controls this section, so that if the grounds specified in clauses (a) and (b) of sub-section (1) of that section subsist, the Sub-Registrar will refuse to grant the certificate ; if not, the certificate has to be granted almost as a matter of course, provided the requisite fee of Rs. 15 has been duly paid. Notice the word "shall" in the section. While granting the licence, the

Sub-Registrar should enter the name of the applicant in the Register maintained under section 7. For the definition of "register" see section 2 (19), *ante*. As to the form of licence, provision has to be made in the Rules.

The effect of reading section 16 into this section is that while granting a licence, the Sub-Registrar can investigate the question whether or not the applicant for licence is disqualified for holding it. If the Sub-Registrar decides this question adversely to the money-lender, the latter can take an appeal to the Registrar under section 16 (3). If the question is decided in favour of the money-lender, he will, of course, be entitled to get a licence subject to payment of the requisite fee. At this stage, the inquiry into the question of disqualification, *ex necessitate*, be *ex parte*, there being no provision for notice to any body else in this connection. Therefore, any finding, which a Sub-Registrar may arrive at, relating to the question of disqualification, at the time of granting the licence, will not be immune from re-agitation when a proceeding is started for cancellation of the licence under section 17, *post*.

Stay of suit when money-lender does not hold licence.

13. (1) No Court *shall* pass a decree or order in favour of a money-lender in any suit instituted by a money-lender, for the recovery of a loan advanced after the date notified under section 8, or in any suit instituted by a money-lender for the enforcement of an agreement entered into or security taken, or for the recovery of any security given, in respect of such loan, unless the Court is satisfied that, at the time or times when the loan or any part thereof was advanced, the money-lender held an effective licence.

(2) If during the trial of a suit to which sub-section (1) applies, the Court finds that the money-lender did not hold such licence, the Court shall, before proceeding with the suit, require the money-lender to pay in the prescribed manner and within the period to be fixed by the Court such penalty as the Court thinks fit, not exceeding three times the amount of the licence fee specified in section 10.

(3) If the money-lender fails to pay the penalty within the period fixed under sub-section (2) or within such further time as the Court may allow, the Court shall dismiss the suit : if the money-lender

pays the penalty within such period, the Court shall proceed with the suit.

(4) The provisions of this section shall apply to a claim for a set-off by or on behalf of a money-lender.

(5) In this section, the expression "money-lender" includes an assignee of a money-lender, if the Court is satisfied that the assignment was made for the purposes of avoiding the payment of licence fee and penalty which may be ordered to be paid under this section.

Suit of money-lender holding no licence to be stayed : Sub-section (1) of the section provides that a Court should not pass a decree or order in favour of a money-lender in a suit which has been instituted by a money-lender (1) for the recovery of a loan after the date notified under section 8, *ante,* or (ii) for the enforcement of an agreement entered into, or of a security given, in relation to such a loan, unless it is shown to the Court that, at the time when the loan was advanced the money-lender held an effective licence. The word "shall" in the section makes the provision of the section imperative, but that does not, however, mean that disregard of this provision takes away the Court's jurisdiction to make a decree or that if a decree is actually made by the Court, the same becomes a nullity. Only a decree or order in favour of a money-lender has been prohibited by sub-section (1) of the section. The sub-section is no bar to the passing of any decree or order *against* the money-lender. The suit in which the passing of a decree or order is prohibited hereby must be one for the recovery of a loan advanced since the date notified under section 8, or for enforcement of an agreement or security in relation to *such* loan. The words "such loan" mean a loan incurred since the date notified under section 8. It must have been noticed that the date of commencement of the Act under section 1 (3) is different from the date notified under section 8. At least six months' time intervenes between these two dates. The date relevant for the purposes of this section is the date notified under section 8 and not the date of commencement of the Act. The sub-section prohibits the making of a decree or order in favour of the money-lender. So, if the money-lender institutes the suit and then dies and his heirs or legal representatives, such as executors and administrators or in the event of an assignment *pendente lite,* the assignee [subject to the limitation prescribed in sub-section (5) of

the section], want to proceed with the suit, the prohibition of sub-section (1) will not apply, because what has been prohibited here is the making of a decree or order *in favour of the money-lender himself* and not in favour of his heirs or legal representatives or his assignees [except in the special case contemplated in sub-section (5) hereof]. It may be mentioned here that in section 2(2), the term *borrower* has been defined as including his successor-in-interest. But the term "money-lender" in secion 2 (13) has not so defined as to include his successor-in-interest. Therefore, although under the general law, as also under section 146 of the C. P. Code, the money-lender may include his heirs and legal representatives, in this Act (see section 2), that will not be possible; particularly sub-section (2) of this section talking of a *penalty* cannot possibly mean that the heirs or legal representatives of the money-lender is to be punished for the default of the money-holder himself. Therefore, at least, so far as this section is concerned the operation of the section must be limited only to the case of the money-lender himself. The foregoing remarks can be justified from the use of the words "on behalf of" occurring in sub-section (4) of this section, as also from the specific mention of the word, "assignee' and the absence of mention of the heirs etc. in sub-section (5) hereof. The prohibition of sub-section (1) does not apply if the suit has been instituted by a person other than the money-lender *himself*, e.g. his heirs, executors etc. or assigns (if the assignment was not effected to defraud the licence fee). The prohibition also does not apply if the plaintiff satisfies the Court that the money-lender held an effective licence at the time of the loan, incurred since the date noticed under section 8. The prohibition of the section will apply even if only a *part* of the debt was advanced since that date. Under section 8, the loans granted within the first six months after the commencement of the Act are exempted from the requirement as to an effective licence; therefore such loans have been left untouched. What has been prohibited in the section is the passing of a decree or order and not the institution of the suit. The words "is satisfied" show that the Court can *suo motu* go into the question as to whether the money-lender holds an effective licence or not, although the point has not been raised in defence. Read the notes under the heading, "The Court has reason to believe" under section 36, *post*. The burden of *satisfying* the Court that the money-lender holds an effective licence is evidently on the money-lender. In every case the Court should record a finding that it has been so satisfied, otherwise an appellate Court would send back the case for disregard of a mandatory provision of the law.

Meaning of Court.

The Act does not contain any definition of the term "Court" as used in this section. It should also be noticed that the section uses the general term "Court" and not "Civil Court". So, under this Act there is no chance of any controversy being raised over the question whether this Act will apply to the Original Side of the High Court as was done in *Narsinghdas Tansukhdas* v. *Chogemull*, I.L.R. (1939) 2 Cal. 93=69 C.L.J. 458=43 C.W.N. 613=A.I.R. 1939 Cal. 435=183 I.C. 113 (S.B.). The term "Court" will include all the different classes of Civil Courts mentioned in section 3 of the Bengal, Agra and Assam Civil Courts Act (XII of 1887) as also the Original Side of the High Court or the Court of Small Causes of Calcutta or those established under the Provincial Small Cause Courts Act, 1887. It will include also the Union Courts established under section 73 of the Village Self Government Act (V of 1919). In this connection read the notes under the heading "Civil Court" at p. 12 of author's *Bengal Agricultural Debtors Act.*

Penalty for not having licence.

Sub-section (2) : Obliges the Court in which a suit is instituted by a money-lender, not armed with any licence at the time of advancing the loan, to exact a penalty from him. If it transpires in the course of the trial of the suit that the money-lender went without a licence at the time of the loan as required by sub-section (1), the Court will call upon the money-lender to pay a penalty, the amount where-of will on no account exceed three times the licence fee prescribed by sec. 10, that is, not more than Rs. 45. The Court is to fix a time within which the penalty is to be paid. Such time may be enlarged from time to time if good reason is shown in that behalf. The penalty is to be paid in the manner laid down by the Rules. The penalty can be imposed only during the pendency of the suit. If the suit has already terminated in a decree and thereafter the Court discovers that it has inadvertently made a decree without coming to a finding as to whether the money-lender held a licence or not the proper procedure for the Court will be to vacate the decree and to restore the suit to its file and then to proceed in accordance with the provisions of this section. Notice that the holding of licence refers to the time of giving out the loan and not to the date of institution of the suit or any other time. The penalty can be demanded only from the money-lender and not from his heirs or legal representatives or from his assignee [except in the particular case referred to in sub-section (5)]. Notice that this sub-section only speaks of the imposition of a penalty and does not say that the penalty is to be *in addition* to

the licence fee. If the Legislature had intended to exact different sums then it would have distinctly said so as it has done in sub-section (5), where the expression used is " licence fee *and* penalty ". As a matter of fact the licence fee is the amount specified in section 10 and is payable to the Sub-Registrar under section 12. The licence fee enures for the benefit of the *entire* money-lending business. No part of the penalty imposed under this sub-section can be regarded as licence fee, inasmuch as it is neither paid to the Sub-Registrar, nor does it enure for the benefit of the *entire* money-lending business. The penalty simply secures safety for the particular transaction comprised in the suit.

Sub-section (3): Lays down the consequence of default in payment of the penalty demanded by the Court within the appointed or extended time ; if no payment is made in due time, the Court will have no option but to dismiss the suit. The money-lender may however make an application under section 151 of the Civil Procedure for restoration of his suit by showing that he was prevented by sufficient cause from making the payment in due time. An order of dismissal hereunder falls within the scope of clause (b) of section 2 (2) of the C. P. Code and, therefore, will not be a *decree*.

The words "the Court *shall* dismiss the suit" no doubt make it obligatory for the Court to dismiss the suit if no penalty as required by sub-section (2) is paid within the appointed or the extended time, but an omission on the part of the Court to dismiss the suit immediately on the expiry of the fixed time, however, does not render *ultra vires* all orders made in the suit thereafter. So, if the penalty is paid *out of time,* and the Court accepts it and eventually makes a decree in the suit, such decree will not be a nullity. Such an action on the part of the Court may be an irregular exercise of jurisdiction, but not one in excess of the Court's jurisdiction. In such a case the doctrine of "implied extension of time" has to be applied and an acceptance of the penalty out of time would mean that the Court had impliedly, that is, without making an *express* order, enlarged the time originally fixed for the purpose and the payment is within such extended time, comp. *Gopal Proshad* v. *Rajendra Lal,* 20 C.W.N. 615 ; also *Krishna Iyengar* v. *Nallaperumal,* 47 I.A. 33=43 Mad. 550=56 I.C. 163, (P.C.). The words " or within such further time as the Court *may* allow", show that the Court has been given a discretion to enlarge the time originally fixed for the payment of the penalty. Extension of time may be granted as often as the Court thinks fit, and even after the expiry of the period or periods of

previous extension. When the order calling upon the money-lender to pay the penalty is complied with, the Court is to *proceed with* the suit from the stage reached before it was stayed for recovery of the penalty.

Sub-section (4) **: A claim for set-off in defence by the money-lender is subject to the restriction of this section :** If a money-lender who was not armed with the requisite licence at the time of the loan incurred since the date notified under section 8, wants to set-off its amount against the demand of a person who has instituted a suit against him, the penal provisions of this section will apply ; that is, he will be called upon to pay the penalty prescribed by sub-section (2) on pain of his defence being struck off. The provision of this section will apply even when the suit in question is being defended by a person coming in as a legal representative or successor-in-interest of a money-lender, and the claim for set-off is put forward by him *on behalf* of the money-lender.

Sub-section (5) : **If Money-lender in this section includes his assignee :** This sub-section virtually makes an exception to the general scheme of this section which is to apply the restriction of the section only to the money-lender *personally*. If the money-lender assigns his interest in the loan with the object of evading payment of the licence fee *and* the penalty to be imposed under sub-section (2), then the assignee also will be subject to the restrictive and penal provisions of this section exactly in the same way as the money-lender *himself* is. When one person takes an assignment of a debt from another person who answers the description of a money-lender as laid down in section 2(13), it will be his duty to make an enquiry whether his assignor holds a licence. If he does not take this precaution, he will naturally bring himself within the mischief of this sub-section. The position, however, will be otherwise if the assignee made an honest effort to ascertain the fact but was duped by his assignor. The purpose of evading payment of *licence fee and the penalty under* sub-section (2) which brings the assignee within the peril of this sub-section must be one in which both himself and his assignor have participated. If the assignee had not assisted the assignor in his deceitful object, but was himself a victim of the assignor's machinations, his position is safe and he will easily steer clear of this sub-section. This sub-section is not happily worded as it disregards the ordinary rule of **onus of proof.** It says that the word " money-lender " in this section will include his assignee only if the Court *is satisfied* that the assignment was made with the object of evading payment of licence fee etc.

Evidently it is the defendant in the suit who is to so satisfy the Court, but what positive evidence he can possibly lead in the matter, excepting that the assignor had no licence, which is but a negative fact. On the other hand, as a man of ordinary prudence, the assignee should be sure that he is purchasing the debt from a licensed money-lender, and his negligence in the matter will raise a natural presumption against him. The assignee comes forward as a claimant and therefore the moment his right is challenged on the score of want of licence he has got *to satisfy* the Court either of these two positive facts—(1) existence of licence, or (2) his own good faith so that no natural presumption can be made against him. The choice of phraseology in the sub-section should have been made in the light of this position. For the exact significance of the words, "if satisfied", read the notes under section 36, *post*.

It may be mentioned here that although for the purposes of this particular section the term money-lender does not include his assignee except where the assignment is made with the object of avoiding payment of licence fee, for the purposes of the other sections of the Act, the expression "money-lender" will include his assignee, if the loan has been advanced after the commencement of this Act, *vide* notes under section 29, *post*.

Appeal and Revision : . An order for payment of penalty under sub-section (2) or an order disallowing the prayer for extension of time or dismissing the suit under sub-section (3) are not open to appeals, as there is no specific provision anywhere in that behalf. There is no right of appeal unless it is given by statute, [Comp. *Meenakshi* v. *Subramanya,* 14 I.A. 160=11 Mad. 26, P.C.; *Rangoon Botatoung Co.* v. *Collector Rangoon,* 39 I.A. 197= 40 Cal. 21 (27)=16 C.L.J. 245, (P.C.) ; *Mathura Sundari* v. *Haran Chandra,* 43 Cal. 857=23 C.L.J. 443]. Such an order, if within the scope of section 115, C. P. Code, may, however, be revised under that section.

Disqualification of persons for holding a licence.

14. (1) A person shall be disqualified for holding a licence—

(*a*) if so ordered by a Court under section 20, for the period ordered;

(*b*) if he has been convicted of any offence specified in the Schedule to this Act, and if such conviction has not been set aside by any Court of appeal or revision under any law for the time being in force.

(2) The Provincial Government may, at any time, on application in the prescribed form accompanied by the prescribed fee, remove a disqualification referred to in sub-section (1), having regard to the time which has elapsed since the order and the circumstances under which it was made or to the time which has elapsed since the conviction and to the nature of the offence.

Sub-section (1) : **Disqualification for holding a licence :** A person against whom an order has been made under section 20 of the Act declaring him to be disqualified for holding a licence or a person who has been convicted of an offence specified in the Schedule of the Act, but whose conviction has not been set aside by a Court of appeal or revision, is disqualified to hold any licence for the business of money-lending. When the disqualification arises under clause (a) of the section because of an order under section 20, it lasts only for the period fixed in the order itself or till the disqualification is removed by the Provincial Government under sub-section (2) of this section. The disqualification arising from a criminal conviction under clause (b) of sub-section (1) will last for ever unless it is removed by the Provincial Government under sub-section (2) hereof. The effect of the disqualification is that no *effective licence* can be issued to a person who is so disqualified, *vide* the Explanation to section 8, *ante*. The provision of this section is *imperative* as is indicated by the word, 'shall'. The disqualification contemplated by this section attaches to a person only *after* an order under section 20 has been made or the lender has been convicted of any offence specified in the Schedule to this Act. A licence issued at a time when such disqualification had not fastened on the lender, will not become invalid in consequence of a *subsequent* conviction or order under section 20. An annulment of a conviction on appeal or revision operates as if there had been no conviction *ab initio*. Therefore, if a licence was issued after an order convicting the lender was made by the trial Court and before the same was subsequently set aside on an appeal or revision, the same would be valid and operative from the very beginning as if no order of conviction had at all been made. The conviction should be of the offences specified in the Schedule to the Act ; conviction of any other offence will not entail any disability. If an order of conviction is set aside by the appellate Court, but is again restored by the High Court in revision, the disqualification contemplated by the section will attach in the intermediate period between the orders of the lower appellate Court and of the High Court.

Sub-section (2) : **Removal of Disqualification :** This sub-section empowers the Provincial Government to remove the disqualification of a money-lender referred to in sub-section (1). The Provincial Government is to be moved in this behalf by means of an application accompanied by a prescribed fee. The Provincial Government cannot *suo motu* move in the matter. In considering the application for removal of disqualification, the Provincial Government will have regard to the following matters : (1) The length of time that has elapsed since the date of the order by which the money-lender has been declared to be disqualified, (2) whether there were any extenuating circumstances under which the money-lender was declared to be disqualified, (3) the duration for which the money-lender has suffered the disqualification since his conviction of any of the offences specified in the Schedule to this Act and (4) the nature of the offence of which the money-lender was convicted, that is, the extent of moral turpitude of the money-lender has to be taken into consideration in order to determine whether he is a safe person to be restored to the normal rights of an ordinary citizen. Notice the two words, "order" and "conviction". The word "order" refers to clause (a), and the word "conviction" refers to clause (b), of sub-section (1) of this section. In relation to the *order* under section 20, both the *duration* of the disqualification and the *extenuating circumstances* attendant upon the order may be taken into consideration by the Provincial Government in coming to a decision as to whether it should remove the disqualification or not ; but in the case of diqualification resulting from conviction, only the *duration* of the disability and the nature of the offence have to be taken into consideration. The Provincial Government cannot allow its decision to be influenced by any consideration of the *circumstances* under which the conviction was made except in so far as they reflect on the gravity of the offence. The Provincial Government has power only to *remove* the disqualification and not to *enlarge* the period thereof.

Proof of conviction or order for disqualification.

15. Where it is required to be proved for the purposes of this Act that any person has been convicted of an offence specified in the Schedule to this Act or has been disqualified by an order of a Court for holding a licence, such conviction or order may be proved, in addition to any other mode provided by any law for the time being in force—

(*a*) by an extract certified under the signa-

ture of the officer having the custody of the records of the Court in which such conviction was had, or such order was passed, to be a copy of the sentence or order, or

(*b*) in the case of a conviction, by a certificate signed by the officer in charge of the jail, in which the punishment or any part thereof was undergone, or by the production of the warrant of commitment under which the punishment was suffered,

together with, in each of such cases, evidence as to the identity of the person so convicted or in respect of whom such order was passed.

Proof of conviction or order for disqualification : This section furnishes an *additional* method, of proof of the fact of conviction of a money-lender under any of the sections specified in the schedule to this Act or of proof of order for disqualification under section 20 of the Act, besides that provided in the general law of the country, and says that *in addition* to any other mode provided by any law for the time being in force, the above two things, viz., criminal conviction and declaration of disqualification, may be proved by (a) the production of certified copies of the sentence or the order in question over the signature of the record-keeper of the Court by which the order of conviction was made or the order of disqualification was passed, or in the case of conviction, by (b) the certificate of the officer in charge of the jail or by the production of warrant of commitment—together with evidence of the identity of the person convicted or declared disqualified.

This *additional* method of proof is permissible only in the proceedings *under this Act ;* in proceedings unconnected with this Act, the usual rules of evidence apply. This has been made clear by the words, " for the purposes of this Act '. The rule of proof enacted in this section is not intended to replace the general rules of evidence but is only *in addition to* them. As a matter of fact, the Provincial Legislature has no power to enact any provision of law in supersession of any of the Governor-General's Statutes, e.g. the Indian Evidence Act ; read sections 107 and 108 of the Government of India Act, 1935.

Proved : The word "proved" here has been used in the very same sense in which the term has been used in section 3 of the Indian Evidence Act, 1872. Under the said section 3 a fact is said to be proved when after conisdering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it exists.

Refusal to grant licence.

16. *(1) The grant of a licence shall not be refused except on one or more of the following grounds, namely:—

(*a*) that the applicant has not complied with the provisions of this Act or of the rules made thereunder in respect of an application for the grant of a licence ;

(*b*) that the applicant or any person responsible or proposed to be responsible for the management of the applicant's money-lending business is under this Act disqualified for holding a licence.

(2) A Sub-Registrar refusing a licence—

(*i*) under clause (*a*) of sub-section (1) shall record his reasons for such refusal ;

(*ii*) under clause (*b*) of sub-section (1) shall record the evidence of the disqualification.

(3) An appeal from the orders of a Sub-Registrar refusing a licence shall, if made within thirty days from the date of such order, lie to a Registrar authorised under section 6 to hear such appeal.

(4) A Registrar referred to in sub-section (3) may decide if such appeal is allowed, as to the Sub-Registrar to whom application for a licence shall be made and his decision shall, subject to the provisions of sub-section (5), be final for all purposes, and shall be binding on such Sub-Registrar whether he be under the control of such Registrar or not.

(5) A Competent Court may, on application made within ninety days from the date of the deci-

sion of the Registrar in appeal under sub-section (3), revise such decision.

(6) The procedure to be followed by a Competent Court or by a Registrar in proceedings under this section shall be in accordance with rules prescribed under this Act.

(7) The provisions of sections 4, 5 and 12 of the Indian Limitation Act, 1908, shall apply to all appeals and applications for revision made under this section, and for the purposes of the said sections a Registrar shall be deemed to be a Court.

Sub-section (1): **When licence may or may not be refused:** The scheme of this section is to make grant of licence the rule and its refusal an exception. If an application for the grant of licence is made under section 11, *ante*, in compliance with the essential requirements of the statute, the Sub-Registrar to whom it is presented, *shall* grant it almost as a matter of course if the applicant or his manager through whom the applicant wants to manage his money-lending business is not disqualified under the Act to hold the licence. The two sub-clauses (a) and (b) of sub-section (1) specify two grounds for refusing the licence. Any one of these two grounds is sufficient to warrant an order of refusal. Under sub-clause (a), the application for grant of licence may be rejected if it is not in conformity with the provisions of the Act or with the rules framed thereunder. Under sub-clause (b), the application has to be rejected if the applicant or his manager through whom the money-lending business is to be carried on is disqualified for holding the licence. If the grounds mentioned in the two clauses (a) and (b) do not exist, the Sub-Registrar will be bound to grant the application for licence. This is clear from the word "shall". The converse position, however, does not necessarily hold good; that is, if the above grounds exist, the Sub-Registrar *may*, but is not bound to, refuse the application for licence under section 11, *ante*. The Sub-Registrar may insist on compliance with the statute, if he likes; but he has power to condone the default and allow the defects to be remedied.

Non-compliance with the provisions of the Act contemplated in clause (a) will cover the case of an application made before a wrong Sub-Registrar, that is, before a Sub-Registrar who has no territorial jurisdiction over the matter. If the Sub-Registrar finds that he cannot entertain the application for licence in consequence of the money-lender not having a place of money-lending business

within his jurisdiction, the proper course for him to adopt will be either to reject it or to allow it to be returned and presented before the proper Sub-Registrar. If the application for grant of licence be defective in form or as regards the manner of presentation or be wanting in the necessary particulars, the Sub-Registrar may allow the applicant to amend his application and remove the defects or he may reject the application altogether, but he will be bound to record the reasons for his refusal under clause (i) of sub-section (2) of this section.

Sub-section (2) : **Duty of Sub-Registrar when he refuses the licence :** When a Sub-Registrar refuses a licence under clause (a) of sub-section (1) hereof, it will be his duty to record his reasons for his act ; that is, he must state by reason of what illegalities or irregularities, the application in question has been vitiated. When the refusal is on the ground mentioned in clause (b) of sub-section (1), the Sub-Registrar will be bound to record the evidence of the disqualification of the applicant or his manager. The provisions of this sub-section have been made with a view to enabling the Registrar to whom an appeal is made under sub-section (3) to scrutinise the propriety of the order of the Sub-Registrar refusing a licence. If the reasons for such refusal are not recorded under clause (i) or the evidence of the applicant's or his manager's disqualification is not recorded, it will be a serious irregularity warranting an interference on the part of the Registrar, hearing the appeal.

Sub-section (3) : **Appeal to Registrar :** An appeal lies against an order of the Sub-Registrar refusing a licence to the Registrar, provided the Registrar has been empowered under section 6 of the Act to hear it. The power of control which a Registrar can exercise over a Sub-Registrar under said section 6 includes a power of hearing appeals from the orders (of refusal) made by the latter. An appeal lies only when the Sub-Registrar *refuses* to grant a licence. Grant of licence in a defective form [see section 12] does not amount to an order of refusal and therefore no appeal lies hereunder if the licence is not granted in the proper form, or for the matter of that, in the prescribed form. If the Sub-Registrar *defers* the grant of licence, that will not be an order of refusal so as to render the appeal provisions of this sub-section operative. In all such cases, the proper procedure for the applicant to adopt will be to approach the Sub-Registrar in conformity with Viscount Dunedin's observations in *Maung Kyi Oh* v. *Ma That Pon,* 4 Rang. 513=A.I.R. 1926 P.C. 29 (P.C.)=94 I.C. 916 and tell him that he has gone wrong and must rectify his

errors or omissions. The **limitation** for such an appeal is thirty days (and not one month) from the date of the order refusing to grant licence.

Limitation for appeal.

In computing this period of limitation it will be possible for the appellant to avail himself of the provisions of sections 4, 5 and 12 of the Limitation Act. Section 4 of the Limitation Act lays down what is very often curtly called the "holiday" rule, that is, if limitation expires on a *holiday* it may be extended till the reopening day. Section 5 of the Limitation Act makes provision for excusing delay on the ground of sufficient cause. Section 12 of that Act authorises exclusion of the time requisite for copy from the period of limitation. The other sections of the Limitation Act (including particularly sections 14 and 18) have not been mentioned here and it may be argued that by such omission their operation here has been *impliedly* excluded. But such *implied* exclusion does not oust the application of section 29 (2) (a) of the Limitation Act, with the result that sections 14 and 18 of the Limitation Act might possibly apply to cases hereunder subject to the result that follows from the fact that the Registrar is a Court only for the purposes of sections 4, 5 and 12 of the Indian Limitation Act and not for the purposes of either section 14 or section 18 of the said Act. Notice that section 29 (2) (a) of the said Act contains the word "expressly". Therefore, the sections specified in section 29 (2) (a) not being *expressly* excluded by this Act, could apply hereunder, [see *Jiwan Singh* v. *Managing Committee, Gurdwara,* A.I.R. 1930 Lah. 800 ; *Rewachand* v. *Karachi Municipality,* A.I.R. 1925 Sind. 322=90 I.C. 44] if such application is not repelled by reason of the fact that the Registrar is not a *Court* for the purposes of the other sections of the Limitation Act than sections 4, 5 and 12. An *express exclusion* means an exclusion by express words, *Ibid.* Comp. *Sati Prosad* v. *Gobinda Chandra,* 56 Cal. 805=33 C.W.N. 227=A.I.R. 1929 Cal. 325=121 I.C. 673. As to instances of *express* exclusion, consult section 185 of the B. T. Act or section 78 of the Provincial Insolvency Act.

Sub-section (4): **Special power of Registrar in the appeal :** A Registrar who is competent to hear an appeal from the order of the Sub-Registrar under sub-section (3) will have power, while hearing the appeal, to decide as to to which Sub-Registrar the application for a licence should have been made and his such decision shall, *subject to the provisions of sub-section* (5), be final *for all purposes* and be binding even on the Sub-Registrar in favour of whose jurisdiction the Registrar gives his verdict, although such Sub-Registrar is not under his control. The order of a Registrar as an appellate officer under this sub-section is

"final" *for all purposes,* that is, it cannot be re-opened on any account except in revision before a competent Court under the next sub-section, namely, sub-section (5). This has been made explicit by the condition in italicised words above, *viz.* "subject to the provisions of the sub-section (5) ". The word " final " in this section has been used in the same sense as the term has been used in section 48 of the Guardians and Wards Act. The word "final" in said section 48 has been construed to mean " not liable to be contested by suit or otherwise ". That is also the meaning of the term as used here. The phraseology of said section 48 of the Guardians and Wards Act being substantially different from that of this section, and this Act not being *pari materia* with the said Act, the decisions under that Act should not, however, be imported for construing the meaning of this sub-section. For the effect and significance of the term *final,* compare Rule 1 A framed under the Bengal Local Self-Government Act, as also *Kasiruddin* v. *Mafizuddin,* 40 C.W.N. 753=A.I.R. 1936 Cal. 295=165 I.C. 354 ; *Chandra Kishore Mandal* v. *Sashindra Kumar,* 65 C.L.J. 172=41 C.W.N. 441=A.I.R. 1937 Cal. 174=171 I.C. 365 ; *Abala Kanta* v. *Syed Jalaluddin,* 41 C.W.N. 986=A.I.R. 1937 Cal. 487=174 I.C. 501 ; *Tara Prosad* v. *Abul Kasam,* 69 C.L.J. 148=42 C.W.N. 441=A.I.R. 1938 Cal. 359=179 I.C. 746. In this connection read also the notes at pp. 144-45 of author's *Bengal Agricultural Debtors Act.* Under sub-section 6, the procedure to be followed by the Registrar in appeals under this section, shall be in accordance with the rules framed under this Act [see sub-section (6)] and not in accordance with the provisions of the Civil Procedure Code which regulate the procedure before Courts of Civil Judicature [Read the Pre-amble of the Code of Civil Procedure], which evidently the Registrar is not. Sub-section (7) of this section no doubt for certain limited purposes makes the Registrar a Court, but that does not make the Registrar a Court for all purposes. The very mention of specific purposes in sub-section (7) indicate that the Legislature wanted to make an exception there to the general rule that the Registrar is not a Court. Read the notes under sub-section (7), *post,* at p. 76, *infra.*

The order contemplated by this sub-section can be made by the Registrar only when he *allows the appeal.* If he rejects or *disallows* the appeal, the order of refusal made by the Sub-Registrar stands, and the Registrar exercising appellate powers will not be entitled to say that the application for licence be made before some other Sub-Registrar.

Sub-section (5) : **Revision by a Competent Court :** It must have been seen at p. 44, *ante,* that a Competent Court, as

defined in section 4, *ante,* has jurisdiction to entertain proceedings under this section as also under sec. 19. The words "proceedings under sec. 16" contained in said section 4 refer to a revision application contemplated by this sub-section. The money-lender, if he is affected by an adverse order of the Registrar made under sub-section (4) in the exercise of his appellate powers, will have the right to make an application for revision of that order before a Competent Court. The application for revision has to be made within ninety days (and not three months) from the date of the *decision* of the Registrar in appeal under sub-section (3). The remarks that have been made regarding the computation of thirty days mentioned in sub-section (3) at p. 73, *ante,* will apply *mutatis mutandis* to the computation of the 90 days prescribed by this sub-section. The procedure to be adopted by a Competent Court in hearing Revision applications under this section is to be guided by the Rules framed under section 44, *post.* Read in this connection the notes at p. 48, *ante.* Read also the notes under sub-sections (6) and (7), below.

The word "may" in the sub-section shows that the power of revision conceded by this section is discretionary with the competent Court exactly in the same way as the power of revision under section 115 of the C. P. Code is.

The order on revision by a Competent Court is not open to further revision by High Court : The effect of the provision contained in sub-section (4) making the appellate decision of the Registrar *final,* "subject to the provisions of sub-section (5)" is just to give only *one* chance for revision by the Competent Court. Therefore, there can be no further revision of the order by the High Court under section 115 of the C. P. Code. Besides, with the repeal of the old section 107 of the Government of India Act, the general power of superintendence by the High Court as a *judicial* head, has been abrogated. Under sec. 115 of the C. P. Code, the High Court can revise only the decisions of the *subordinate* Civil Courts. Section 3 of the C. P. Code, shows what Courts are subordinate to the High Court and the Civil Courts Act defines the Civil Courts. *A Competent Court* under this Act is neither within section 3 of the C. P. Code nor a Civil Court under the Civil Courts Act. This will be an additional reason in support of the view against a further revision by the High Court. Although the Competent Court functions as a Court and not as a *persona designata,* still section 115 of the C. P. Code will not apply to such cases. Cf. *Sachindranath* v. *Suryakanta,* 42 C.W.N. 54=A.I.R. 1937 Cal. 720=176 I.C. 515 ; *Gopinath Shah* v. *First Land Acquisition Collector,* 42 C.W.N. 212=A.I.R. 1938 Cal. 250=177

I.C. 866. Consult also the cases cited under the heading, "Special power of Registrar in the appeal" at p. 74, *ante*. One constitutional question may arise in relation to the topic under discussion; namely, that in, negativing the High Court's power of revision as aforesaid, the Provincial Legislature has exceeded its authority, but we have great doubt if such a question can at all legitimately be raised, specially when the High Court itself has no revisional powers in the case because of non-application of sec. 115 of the C. P. Code.

Sub-section (6): **Procedure in Appeal and in Revision Cases hereunder**: The procedure which a Competent Court is to follow in a revision case under sub-section (5) or a Registrar is to follow in an appeal under sub-section (3) of this section *shall* be in accordance with the rules prescribed under this Act. So, in relation to the proceedings under this section, the Competent Court is to follow the procedure prescribed by the Rules *in so far as they go,* but it has been seen under section 5(1), *ante,* that in relation to the proceedings under section 19 the Competent Courts go by the ordinary procedure of civil suits, of course, if there be nothing to the contrary in the Rules in that behalf.

Sub-section (7): Computation of the period of limitation for appeals and revision in cases under this Section: The period of limitation for an appeal to the Registrar under sub-section (3) is *thirty* days and that for an application for revision to a Competent Court under sub-section (5) is *ninety* days. In computing these two periods the provisions of sections 4, 5 and 12 of the Indian Limitation Act may be utilised [*vide* the notes at p. 73, *ante*]. This sub-section does not *expressly* exclude the sections which section 29 (2) (a) of the Limitation Act specifies in excess over the sections mentioned here and the effect of it is, as seen at p. 73, *ante,* that those extra sections will apply to appeals and revision cases contemplated by this section, *vide* notes at pp. 72-73, *ante.* Sections 4, 5 and 12 of the Limitation contain reference to "Court" and lest the application of those sections should be ousted by a contention that the Registrar is not a Court, an express provision has been made in this section declaring that *for the purposes of* sections 4, 5 and 12 of the Limitation Act a Registrar *shall be deemed* to be a Court. The words "shall be deemed" unmistakably indicate that ordinarily a Registrar is not a Court, but for the limited purposes of this sub-section, the Registrar is to be taken as a Court. Read the notes at pp. 73-74, under sub-section (4). For other purposes than those of sections 4, 5 and 12 of the Limitation Act, evidently, a Registrar is not a Court. Registrar is certainly not a Court for the purposes of section 115 of the C. P. Code, and

far less a Court subordinate to the High Court. So no revision application can be made to the High Court against a decision of the Registrar. Read also the notes at p. 75, *ante*.

17. Any Sub-Registrar may, after giving the money-lender to whom a licence entered in the register maintained by such Sub-Registrar was issued an opportunity of being heard, cancel the licence if it is proved that such money-lender was disqualified for holding a licence at the time when such licence was issued; and thereupon the provisions of clause (*ii*) of sub-section (2) and of sub-sections (3), (4), (5), (6) and (7) of section 16 shall apply.

Cancellation of licence by a Sub-Registrar.

Cancellation of licence by a Sub-Registrar : This section confers on the Sub-Registrar the power of cancelling the licence of a money-lender under certain circumstances. The section gives no indication by whom a proceeding for cancellation has to be started. It simply says that a Sub-Registrar will have power to cancel a licence *if it is proved* that the money-lender in question was disqualified for holding a licence at the time when such licence was issued. Now, as such proof must always proceed from outside agency, it follows as a necessary corollary that the Sub-Registrar cannot proceed *suo motu* under this section. Primarily, it is the borrower who is to supply such proof and therefore a Sub-Registrar can be moved to take action under this section by the borrower in the first instance. Cf. section 19, *post*. But as the section has been couched in very general terms, it is possible to conceive of other agencies having supplied the proof in order to enable the Sub-Registrar to take action hereunder. For example, the jail authorities who have or had a money-lender in custody may send an authentic report of the fact to the Sub-Registrar and the latter may thereupon proceed under this section. The Sub-Registrar can cancel a licence under this section only on the ground of disqualification subsisting at the time of grant of the licence. At that initial stage a disqualification arising from a declaration under section 20 is unthinkable. Therefore it is clear that the disqualification contemplated in this seciton must be the disqualification arising from a criminal conviction referred to in clause (b) of section 14 (1). Of course, with respect to a renewed licence, an order under section 20 can come into play. In order to justify an order of cancellation, the fact of initial disqualification

has to be *proved* by means of evidence, and the Sub-Registrar is under an obligation to record the evidence of the disqualification under section 16 (2) (ii), which has been made applicable to a proceedings under this section ; *vide* the notes under the heading, "Procedure on Appeal" below.

Power of cancellation is discretionary with the Sub-Registrar.

The word "may" shows that the power of cancelling a licence is discretionary with the Sub-Registrar. The mere circumstance that the fact of an *initial* disqualification has been brought to the notice of a Sub-Registrar will not warrant his interference in every case. The Sub-Registrar will have to see what amount of mischief is likely to result if the licence is not revoked.

Such power can be exercised only upon notice to the money-lender.

When a Sub-Registrar proposes to proceed under this section, he must give the money-lender, against whom he is about to take action, an opportunity of being heard in defence. This is in accordance with the maxim that no man should be condemned unheard and is very often expressed as the rule of *audi alteram partem* (hear the other side). It is an elementary rule of universal application that an official order which may possibly affect or prejudice a person should not be made unless that person has been afforded an opportunity of being heard, consult *Ajanta Singh* v. *Christien,* 17 C.W.N. 862 ; *Jagannath* v. *Mohesh,* 25 C.L.J. 149 (152) ; *Rajendra* v. *Atalbehari,* 25 C.L.J. 456 ; *Satyendra* v. *Narendra,* 39 C.L.J. 279 ; *Ramnath* v. *Rudra Mahanti,* 18 C.L.J. 142. Read the observations of Willes J. in *Cooper* v. *Wordsworth,* (1863) 14 C.B.N.S. 180 (190)—cited with approval in *Gorachand* v. *Rakhal,* 37 C.L.J. 473. If an order is made cancelling a licence without giving any previous notice to the money-lender concerned as provided herein, the money-lender will have the right to appear before the Sub-Registrar and complain of the *ex parte* order, and ask him, in the exercise of his *inherent powers,* to set aside the same and make a fresh order in his presence. This the money-lender can do not by virtue of section 151 of the C. P. Code (which evidently does not apply to the case), but because of the Universal Rule that an authority which has power to make an evil order has also the inherent power to undo the evil done by it. The aggrieved money-lender can also seek his remedy by way of an appeal to the Registrar under section 16 (3), which has been extended to a case like this, and can adduce evidence on oath or

by an affidavit before the Registrar of the fact of want of notice on him as required by this section 18, *post*.

Procedure and Appeal : The section in express terms provides that when a Sub-Registrar cancels a licence hereunder the provisions of section 16, sub-sections 2 (ii) 3, (4), (5), (6) and (7) will apply. This means that the Sub-Registrar will have to record the evidence of the disqualification and an appeal will lie to the Registrar from the order of cancellation made by the Sub-Registrar and that an order on appeal made by the Registrar will be open to revision by a Competent Court and the the Competent Court or the Registrar, as the case may be, shall in all such proceedings, adopt the procedure prescribed by the Rules. Although section 16 (2) (i) has not been extended to a proceeding hereunder, still that will not exonerate the Sub-Registrar from recording his reasons for the order of cancellation, because the very obligation imposed on him to record the evidence of disqualification carries the implication that he is bound to express his opinion on it. The provision for appeal further strengthens this view.

Power to Registrar and Sub-Registrar to examine any person on oath.

18. For the purposes of an inquiry under this Act relating to a disqualification for holding a licence a Registrar or a Sub-Registrar shall have and may exercise the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, in respect of enforcing the attendance of any person and examining him on oath.

Procedure for enquiry about Disqualification for holding a licence by Registrar and Sub-Registrar : For the purpose of an enquiry into the question whether a money-lender was or was not disqualified for holding a licence, the Registrar or the Sub-Registrar will have the power of summoning witnesses and examining them on oath just like a Civil Court. A Civil Court possesses such powers under section 31, read with the rules of Orders XVI and XVIII of the Code of Civil Procedure, 1908. Therefore, while holding an enquiry into the question of disqualification of the money-lender as aforesaid, the Registrar and the Sub-Registrar can adopt the procedure prescribed by the Rules in Orders XVI and XVIII of the Civil Procedure Code.

It has already been seen that under section 16 (2) (ii) a Sub-Registrar has got to record the evidence of disqualification.

The question of disqualification comes up before the Sub-Registrar on two occasions; *once*, when he has got to deal with an application for the grant of licence under section 11, and *again* when a proceeding is started for cancellation of the licence under section 17. On both the occasions he possesses the same power of summoning and examining witnesses. On the first occasion, the investigation of the question is *ex parte* and therefore any finding about the question on this occasion, is not, by reason of any rule analogous to *res judicata*, immune from re-agitation when the question is raised in the subsequent proceeding for cancellation of the licence under section 17, *ante*. Read the notes at p. 29, *ante*.

The power of a Civil Court, with which a Registrar or Sub-Registrar is invested under this section can be exercised only (i) in an enquiry into the question of disqualification, and (ii) in the matter of summoning and examining witnesses and not in any other respect.

If a witness disregards the summons issued by a Registrar or a Sub-Registrar, he can be hauled up for contempt or can be punished with a fine, *Sibkumari v. Secretary of State*, 31 C.L.J. 363; see also *Nabadwip* v. *Secretary of State*, 20 C.W.N. 511; *Ebrahim* v. *Emperor*, 4 Rang. 257. A Registrar or Sub-Registrar having been given the power of examining witnesses on oath, he will have an authority to administer an oath under section 4 of the Indian Oaths Act and the witnesses refusing to take oaths or making false statements on oath will bring themselves within the perils of sections 178 and 181, respectively, of the Indian Penal Code.

An appeal before the Registrar partakes of the nature of an original proceeding.

The question of disqualification can come up before the Registrar only in the form of an appeal contemplated by sub-section (3) of section 16 and the procedure for such an appeal is, under section 16 (6), to be in accordance with the rules framed under section 44, *post*. In addition to the prescribed rules, the Registrar, while hearing an appeal, will have to conform to the provisions of Orders XVI and XVIII of the C. P. Code, as laid down in this section. It may be noticed that in appeals under the Civil Procedure Code, the appellate tribunals more or less exercise the functions of a mere correcting authority, but in appeals before the Registrar under section 16, the Registrar's power is of a composite character, being partly that of a correcting authority and partly that of *de novo* investigator. This is apparent from the power given by this section to the Registrar

to examine witnesses. The principle of entrusting power of fresh investigation to an appellate officer is no new thing in the history of codification in this Province. An instance of such powers is furnished by section 24 of the Calcutta Rent Act (III of 1920, B.C)—since repealed. Read in this connection *Counsell* v. *Sukumari Devi,* 30 C.W.N. 116.

Application for cancellation of licence.

19. Any borrower may, in respect of any money-lender from whom he has taken a loan, make an application to a Competent Court for an order under section 20 on the ground that such money-lender has committed such contravention of the provisions of this Act or the rules made thereunder as render him unfit to carry on the business of money-lending, and on receipt of such application, the said Court shall hold such inquiry as it deems necessary.

Cancellation of Licence by Competent Court : Section 17 of the Act deals with cancellation of licence by a Sub-Registrar, and this section deals with such cancellation by a Competent Court.

Court's power to cancel a licence.

The Sub-Registrar can cancel the licence only on the ground of money-lender's disqualification but a Competent Court cancels a licence under this section on the ground of contravention of the provisions of the Act or of the Rules made thereunder. Therefore, the scope of the proceeding before the Sub-Registrar under section 17 is altogether different from that of the proceeding before a Competent Court under this section. A borrower [see section 2 (2)] has been given by this section a right to make an application before a Competent Court for cancellation of the licence of a money-lender from whom he has taken a loan and for an order under section 20. The borrower can make an application under this section only in respect of a money-lender from whom he *has* taken a loan and not in respect of any and every money-lender of the province. In order to render such an application competent, it is also necessary that the loan is still *subsisting;* this is clear from the expression "*has taken a loan*". If the borrower *had* taken a loan and has already repaid it, he cannot any more make an application hereunder. In a proceeding under this section the borrower has to show that his loan is still subsisting and the money-lender can refute the borrower's charge by showing

that the loan has already been repaid. The mere fact that the loan has become time-barred does not render the loan *non-est* and therefore it will be no defence for a money-lender under this section that the borrower's loan has become irrecoverable by lapse of time. The **proceeding** contemplated by this section has to be started by means of an *application* bearing a Court fee stamp of 12 as. It will be a miscellaneous proceeding terminable by an *order* and not a *decree*. In the application the borrower should pray (i) that the money-lender concerned be declared disqualified for holding a licence, (ii) that the licence held by the money-lender be cancelled and impounded, (iii) that the grounds of disqualification and the order of cancellation to be passed by the Competent Court be endorsed on the licence held by the money-lender, *vide* section 20 (1) (a) and (b). An application under this section can be made only on the ground that the money-lender has contravened the provisions of the Act or of the rules and has thereby become unfit to carry on the business of money-lending. For the meaning of the expression, "business of money-lending", *vide section* 2(14). When an application has been submitted to a Competent Court under this section, it will be the duty of the said Court to hold an investigation into the matter. There is no provision in the Act for dismissal of an application under this section *in limine,* without holding an investigation into the allegations made in the application. The words "as it deems necessary" show that it is absolutely in the power of the Court to determine what would be the *nature* and *scope* of the inquiry which it has to hold on *receipt* of the borrower's application for cancellation of his money-lender's licence. A mere contravention of the provisions of the Act or of the Rules made under the Act will not justify the making of an order prayed for. The Competent Court, before making an order in favour of the borrower, must be *satisfied* that the contravention of the statute or of the Rules thereunder was of such a character that it has rendered the money-lender unfit to carry on his business. As to the standard of evidence necessary to *satisfy* the judicial conscience, read the notes under the heading "the Court has reason to believe" under section 36, *post.* Unless the Competent Court is of opinion that the infringement of law reflects on the question of money-lender's fitness for his business, he should not cancel the licence. Whether a particular contravention of the law unfits the money-lender or not is a matter which has been left entirely to the discretion of the Competent Court concerned to be decided by it in the light of the particular circumstances of each individual case.

A borrower as seen at p. 18, *ante,* includes his **surety,** and the rights and liabilities of these two persons are, within certain limits, co-extensive. Therefore, the right to apply for cancellation of a money-lender's licence, conceded by this section to the borrower, extends also to the borrower's surety. It is essential for the applicability of this section that the relationship of money-lender and borrower should subsist between the parties.

The *borrower,* as defined in section 2(2), *ante,* includes also his successor-in-interest ; therefore, not only the borrower himself, but also his heirs, legal representatives, executors, administrators and assigns, can make an application under this section. The words, "from whom he has taken a loan" are intended to denote the money-lender against whom an application for cancellation can be made and not to restrict the right of making the application for cancellation to the *original* borrower who has taken the loan to the exclusion of his successors-in-interest who evidently have not taken the loan.

Procedure for inquiry hereunder : In a proceeding hereunder, the Competent Court shall have the same powers and shall follow the same procedure as it has and follows in civil suits ; *vide* section 5(1) and read the notes at pp. 47 and 82, *ante.*

Court's power to cancel a licence.

20. (*1*) A Competent Court on an application under section 19 or a Court trying a suit to which this Act applies or a Court passing an order of conviction upon a money-lender for an offence under this Act, if satisfied that the money-lender has committed such contravention of the provisions of this Act or of the rules made thereunder as, in its opinion, makes him unfit to carry on the business of money-lending—

(*a*) shall cause the particulars of the conviction, if any, and of any order passed by the Court under this sub-section to be endorsed on the licence held by the money-lender or by any other person affected by such order; and

(*b*) may declare such money-lender or any person responsible for the management of his money-lending business or

both disqualified for holding a licence for such period as the Court may think fit and shall cancel and impound the licence held by the money-lender:

Provided that, except in the case of an order passed by a District Court, or by the Court of an Additional District Judge or by the Court of Small Causes of Calcutta, the period of disqualification shall not exceed one year.

(*2*) If a Court other than a District Court, or the Court of an Additional District Judge or the Court of Small Causes of Calcutta is of opinion that a period of disqualification exceeding one year should be imposed, it shall record its opinion and forward the proceedings to the District Court having jurisdiction in the place where such Court is held.

(*3*) The District Court to which such proceedings are submitted may, if it thinks fit, examine the parties and recall and examine any person who has already given evidence in the proceedings, and may call for and take any further evidence, and shall pass such order in the case as it thinks fit in accordance with the provisions of sub-section (*1*).

(*4*) Any person aggrieved by the decision of a Court under this section may appeal against such order, in the case of the Court of Small Causes of Calcutta to the High Court and in the case of any other Court to the Court to which an appeal ordinarily lies from the decision of the Court passing the order; and the Court which passed the order or the Court of appeal may, if it thinks fit, stay the operation of the order under this section pending the disposal of the appeal:

Provided that where the Court of appeal sets aside or varies an order passed under this section, it shall order that any endorsements made in pursuance thereof upon a licence held by a money-lender shall be erased or modified.

(*5*) The substance of any order passed under sub-section (*1*), sub-section (*3*) or sub-section (*4*) shall be sent forthwith in the prescribed form by the Court passing the order to the Provincial Registrar and also together with the cancelled licence to the Sub-Registrar who maintains the register in which the licence affected has been entered for entry in the said register and for such circulation of the substance of the said order to other Registrars as may be prescribed.

(*6*) Any licence required by a Court for endorsement under sub-section (*1*) shall be produced in such manner and at such time as the Court may direct by the person by whom it is held, and any person who without reasonable cause makes default herein shall be liable on conviction to a fine not exceeding fifty rupees for each day of the period during which the default continues.

(*7*) The powers conferred on a Court under sub-section (*1*) may be exercised by a Court in appeal or in revision.

The Section : The section empowers certain Courts to scrutinise the conduct of a money-lender in the course of proceedings under section 19 or 42 of the Act or in the course of a trial relating to a loan which is amenable to the provisions thereof. Any of these Courts, if it finds in the course of the trial held by it that the money-lender has contravened any of the provisions of the Act or of the Rules made thereunder, shall make a suitable order in accordance with the provisions of this section and endorse the same on the money-lender's licence and *may* further declare the money-lender to be disqualified for holding the licence for a particular period. When a declaration of disqualification is so made by the Court, it *shall* cancel and impound the licence. "Cancel" means to strike out or revoke the contents of a document by drawing lines (*cancelli*) across it, or simply by writing or stamping the word "cancelled" on its very face, and "impound" means to place in a pound or to retain in the custody of the law. The section also provides for what lengths of time the disqualification is to last in particular cases. As the order contemplated by the section is likely to seriously prejudice the money-lender, he has been given a right

of appeal. Sub-section (5) of the section contains details of procedure as to how an order under this section is to be conveyed to the Sub-Registrar in order to enable him to make necessary alterations in the Licence-register or how the same should be published for general information and actions. Sub-section (6) authorises a Court taking action under this section to compel production of the licence, so that it may make necessary endorsements on it. Sub-section (7) declares that an Appellate Court is to exercise all the powers of an original Court. This provision is very much similar to the rule enacted in section 107 (2) of the Code of Civil Procedure.

Which Court can make an order under this Section : An order of cancellation or impounding of a licence and of declaration of disqualification of a money-lender under this section can be made by three Courts : (1) a Competent Court (defined in section 4) to whom an application under section 19 has been made, (2) a Court before which a suit relating to a loan subject to this Act is pending, (3) a Court which has convicted a money-lender for an offence under this Act. Under sub-section (7), when an appeal is taken, against an order under this section, or if the matter is taken to a revisional Court, the Court of appeal or revision can exercise all the powers of the original Court. For the meaning of the expression "a suit to which this Act applies", see section 2 (22), *ante*.

Conditions on which an order hereunder can be made : A Competent Court can make an order under this section only if an application is made to it under section 19 of the Act. A Civil Court can make such an order if a suit to which this Act applies [as defined in section 2 (22)] is in the course of trial before it. A Court which has passed an order of conviction upon a money-lender for an offence mentioned in the Act, is the other Court which is also competent to pass an order under this section. Such a Court, as will appear from section 42(3), *post*, is a Criminal Court not inferior to that of a Presidency Magistrate or a Sub-Divisional Magistrate, or a Magistrate of the first class. In order to justify any of these three classes of Courts in making an order hereunder, it is necessary that the Court *has to be satisfied* that the money-lender has contravened the provisions of the Act or the Rules made thereunder and that such contravention has rendered the money-lender unfit to carry on the business of money-lending. For the meaning of the expression "business of money-lending" see section 2 (14). A Competent Court can take action only *on an application* by a borrower, but the other Courts,

can move in the matter *suo motu* (i.e. of their own motion). In order to satisfy the Court of the contravention of the statute, positive evidence has to be adduced of the fact of contravention. In order to *satisfy*, the judicial conscience of a Court the same standard of evidence has to be adduced as is necessary to render an allegation "proved" within the meaning of section 3 of the Indian Evidence Act. In this connection read the notes under the heading "the Court has reason to believe" under section 36, *post*. Mere contravention of the provisions of the Act or of the Rules will not justify the making of an order under this section, unless the Court is also of opinion that such contravention is of such a character that it shows that the money-lender is unfit to carry on the business of money-lending. The Court should always see whether the infringement of law is merely technical or is a positive defiance of law implying some sort of moral turpitude. If it is of the latter type, the Court should consider it unsafe to leave the licence in the hands of the money-lender.

Nature of the Order to be made herunder : If the Court finds that the money-lender has contravened the statute and also finds that the contravention is of such a flagrant type that it would be unsafe to allow the money-lender to carry on his money-lending business, it would declare the money-lender or his manager in charge of his money-lending business, to be disqualified for holding the licence *for a period,* and would, under sub-section (6) call upon the person holding the licence to produce the same in Court and then cancel and impound it, and also endorse on it the particulars of the offence committed and of the conviction as also the terms of the Order which it passes under sub-section (1). The Court should also convey the substance of the Order to the Provincial Registrar (appointed under section 6) and forward the cancelled licence to the Sub-Registrar to enable him to make necessary entries in the Register of licences mentioned in section 7. As to the mode of cancelling and impounding the licence, *vide* p. 85, *ante*. If the Court finds that the contravention is of such a flagrant kind that it reflects on the character of the money-lender, then it should endorse its order on the licence and cancel and impound it. This the Court is bound to do as enjoined by the word "shall." As regards the other part of the punishment, namely, that relates to the infliction of disqualification for a period, the Court has a discretion in the matter. This is indicated by the word "may" in clause (6), in its first part. In the second part of clause (6), the word "shall" has been used.

The proviso to sub-section (1) lays down that the period of disqualification shall not exceed one year except when the order

Disqualification is to be for what period and when.

declaring the disqualification is passed by a District Court or by the Court of an Additional District Judge or by the Calcutta Small Causes Court. It must have been noticed that under clause (b) of section 4, it is quite permissible for a District Court while functioning as a competent Court to transfer a proceeding under section 16 or section 19 of the Act, pending before it, to the Court of a Subordinate Judge or even to that of a Munsiff. When a proceeding under section 19 comes by a transfer as aforesaid to such Judicial Officers of lower rank, there cannot be any declaration of disqualification for a longer period than one year, even if the Judicial Officer concerned, is of opinion that the facts of the case will warrant the infliction of a longer term. The position is the same in respect of the two other Courts referred to in sub-section (1) which also can make a declaration of disqualification. These two other Courts are—(1) the Court trying a suit to which this Act applies and (2) the Court which passes an order of conviction under the Act. If these two Courts are other than a District Court or a Court of an Additional District Judge or the Court of Small Causes of Calcutta, it will not be in their power to inflict a disqualification for a period exceeding one year. Sub-section (2) provides what a Court of the lower rank ought to do when it realises that the infliction of disqualification for one year only is too mild regard being had to the circumstances of the case and says that in such a case the Court of lower rank should send back the case to the District Court from which it got it by transfer under section 4 or which has jurisdiction in the place where such a lower Court is held. The District Court may thereafter *if it thinks necessary* examine the parties and recall and examine afresh the witnesses already examined by the Court below, and may call for and take further evidence in the matter and then pass an order under sub-section (1) which it thinks suitable under the circumstances of the case. The disqualification to be inflicted should always be *for a period,* albeit for more than one year in certain cases. Perpetual disqualification is inconceivable under this section. As a matter of fact no question of perpetuity arises in relation to a human life which is always limited in point of time. A disqualification expressed as for the remainder of the money-lender's life is for a period and not in perpetuity and is valid under this section.

Licence held by any other person affected by the order : This expression occurring in clause (a) of sub-section (1) evidently refers to the case contemplted by section 42(1)(b) under which

the "money-lender" happening to be an undivided Hindu joint family an order of conviction may *affect* all the members of the family and one of the members of the family so affected by the order may happen to hold the licence. Similar is the position in relation to firms and corporations. It is just to cover these particular cases that the above phraseology has been used.

Sub-section (2) : **Submission of a case to District Court when longer disqualification necessary :** Where the Court of a lower grade is unable to inflict a disqualification for a longer term than one year by reason of the Proviso to sub-section (1) but at the same time the exigencies of the case demand a severer infliction, the proper thing for the Court then will be to forward the proceedings to the District Court having jurisdiction in the place where such Court is held. It will be the duty of the forwarding Court to record its opinion regarding the matter, that is, it will have to say for what particular reasons it considers a severer infliction necessary. The expression, "forward the proceedings," means that the entire case together with all the papers on the Court's file should be forwarded. The records should be accompanied by something like what we commonly call a letter of reference in which the forwarding Court has to record its opinion. As to the procedure which a District Court has to adopt while hearing a reference under this sub-section, provisions have been made in the next Sub-section.

Reference for higher punishment.

Sub-section (3) : **Procedure before District Court after submission of case :** The District Court has been given a discretion in the matter of procedure it should follow when a case is submitted to it for its consideration because of the inability of a Subordinate Court to inflict a disqualification for a longer term than one year. The District Court *may* either proceed on the basis of the evidence recorded by the Subordinate Court, that is, it may proceed on the materials on the record, or it *may* take further evidenc and examine the parties, or their witnesses afresh and for that purpose, if it be necessary, it may recall the witnesses already examined before the lower Court. Notice that no provision has been made for calling for records from the lower Court ; this is because of the fact that the entire proceedings have to be forwarded to the District Court, so the entire records are bound to come as a matter of course and therefore there is no necessity for calling for them separately. As to the meaning of the expression "as it thinks fit," see Maxwell's *Interpretation of Statutes,* 8th Ed., pp. 218-20.

Sub-section (4) : **Appeal :** An order under sub-section (1) is open to appeal. When an order of declaration of disqualification or of cancellation of licence under sub-section (1) is made by a Court of Small Causes of Calcutta, the appeal should lie to the High Court and when such an order is made by any other Court the appeal shall lie to the Court to which an appeal *ordinarily* lies from the decision of the Court passing the order. The word "Ordinarily" signifies that the Courts of appeal are to be selected with reference to the ordinary law of the Province, that is, in accordance with the provisions of the Civil Procedure Code read with the Civil Courts Act or in accordance with the provisions of the Criminal Procedure Code.

The right of appeal given by this section subsists only in favour of an *aggrieved* party. A person who is not aggrieved by an order under sub-section (1) has no right of appeal under this sub-section. The expression "any person" is wide enough to cover the cases of both the money-lender and the borrower. The money-lender is aggrieved if the Court cancels his licence and imposes a disqualification, and the borrower is aggrieved if these things are not done. An order under this section may partly be in favour of a party and partly against him. Each party can prefer an appeal in so far as a particular order is *against* him. He cannot prefer any appeal against that part of the order which is in his favour. Each party should prefer an independent appeal only against that part of the order which is *against* him. This Act does not recognise any such thing as a **cross-objection** within the meaning of O. XLI, r. 22 of the C. P. Code. Comp. *Brojendra Chandra* v. *Prasanna Kumar,* 32 C.L.J. 48=24 C.W.N. 1016=59 I.C. 589 (regarding the question of cross-objection in Letters Patent Appeals). [The matter is however open to re-argument in the light of the P. C. case of *Sabitri* v. *Savi,* 48 I.A. 76=48 Cal. 481=33 C.L.J. 307 P.C. and the Madras F.B. decision in *Vankatesham Chetty* v. *Mottichand,* 49 Mad. 291=A.I.R. 1926 Mad. 316=93 I.C. 293, F.B.].

When an order under this section is made by a Criminal Court while trying an offence under this Act, a question may arise as to whether the **Crown** will have a right of appeal under sub-section (4) of this section. A contention like this will not be tenable for two reasons : *Firstly,* the Crown cannot be aggrieved by an order under this section ; *Secondly,* the Crown is not within the meaning of the term "person" as defined in section 3 (32) of the Bengal General Clauses Act (1 of 1899, B.C.).

When an order under this section is made by a District Court or the Court of an Additional Judge or the Calcutta Small Causes Court or the Presidency Magistrate, an appeal shall lie to the High Court, and will be regulated by the provisions of the High Court Rules.

Appeal to High Court.

In the case of other Courts, appeals are to be preferred to the Courts to which appeals *ordinarily* lie from the respective Courts which may happen to have made the orders.

It may be mentioned here that the scheme of sub-section (4) is to make some distinction between a "decision" and an "order." The difference between these two terms is very much similar to the difference, under the C. P. Code, between 'judgment' and 'decree.' "Decision" is a statement of the reasoning adopted for reaching a particular conclusion in relation to the point in controversy between the parties. "Order" is the operative part of the directions given by the Court after it has arrived at a particular conclusion with respect to the point in dispute.

Stay of Order : When an appeal is preferred against an order under sub-section (4), the appellate Court may direct that the operation of the order appealed from be stayed pending the hearing of the appeal The Court which passed the order, also, has concurrent powers with the appellate Court to direct stay of the operation of the order under appeal during the pendency of the appeal. Compare this provision with those contained in rules 5-6 of O. XLI, of the Code of Civil Procedure.

Appeal against order made on reference : The decision or order against which a right of appeal has been given by sub-section (4) of the section includes an order made under sub-section (3) upon a reference and therefore an appeal lies against an order made on a reference under said sub-section (3). Such an order is certainly an order under this section.

No Second appeal : The Act provides only *one* appeal and therefore there is no second appeal from a decision or order under this section.

Revision : The Courts referred to in the section are all *subordinate* to the High Court, and therefore, the orders made by these Courts are all open to revision by the High Court in accordance with the provisions of section 115 of the C. P. Code. Appealable matters are not open to such revision and the question arises as to whether appealability of a case to the District Court precludes revision by the High Court. The word "thereto" in section 115 of the C. P. Code shows that it is only when an appeal

lies to the High Court that a revision application is barred. [consult *Maharaja Sashi Kanta* v. *Nasirabad Loan Office Co.*, 63 C.L.J. 105; Nasim Ali J. has held otherwise in *Nafar Chandra Sardar* v. *Kalipada Das,* 44 C.W.N. 364; read however the cogent reasonings of Rau J. in 44 C.W.N. 364 for dissenting from the opinion of Nasim Ali J.]. A High Court appeal is possible only when the decision is by the Court of Small Causes of Calcutta. Therefore it is only in the latter case that there will be no revision application to the High Court; read in this connection the cases cited above.

Powers of the Appellate Court: It should be noticed that this section contains no such provision as has been made in section 107(1) of the Code of Civil Procedure although sub-section (7) of this section makes a provision very much similar to that enacted in section 107(2) of the C. P. Code. This section creates a special right of appeal and a special appellate jurisdiction. Such jurisdiction is excepted from the operation of section 107(1) of the C. P. Code, by reason of section 4 thereof. Therefore, the powers of an appellate Court contemplated by the section are limited and not so wide as those referred to in section 107 of the C. P. Code. The **proviso** to sub-section (4) indicates that the only order that a Court of appeal can make is either to affirm the order under appeal or to set it aside or to vary it. It has no power to make an **Order of Remand** in the manner of a Court of appeal acting under the provisions of the Civil Procedure Code. When the order appealed against is *set aside* or varied, the appellate Court *shall* order that any endorsement made in pursuance thereof upon a licence shall be erased or modified. If the appellate Court omits to do so, it will be tantamount to *failing to exercise a jurisdiction vested in it* within the meaning of clause (b) of section 115 of the Code of Civil Procedure and will warrant an interference in revision by the High Court. The actual work of erasure or modification of the endorsement has to be carried by the Court of the first instance. Under sub-section (7) a Court of appeal

Sub-sec. (7).

or of revision can exercise all the powers that have been conferred on the Court of first instance by sub-section (1) of this section. The Court to which a reference is made under sub-section (2) is a Court of revision for the purposes of sub-section (7); this is so because the basic principle of a reference is that the referee Court has the power *to revise* the orders of the referring Court.

Sub-section (5) : **Order of Cancellation to be remitted to Provincial Registrar and Sub-Registrar:** When a licence is cancelled under sub-section (1) or sub-section (3) or

sub-section (4) of this section, the Court which effects the cancellation is to communicate, without delay, the order to the Provincial Registrar and to the Sub-Registrar, having custody of the Register in which the cancelled licence has been entered. When the order of cancellation is communicated to the Sub-Registrar, the Court concerned should, along with the communication, forward the cancelled licence in order to enable the Sub-Registrar to make necessary corrections and alterations in the Register of licences and to circulate the cancellation to other Registrars in accordance with the Rules. The communication and circulation should be made after the lapse of some time as is done in the corresponding circumstances under Rule 103 of the Bengal Agricultural Debtors Act.

Sub-section (6) : **Production of Licence for cancellation :** Clause (1)(a) of sub-section (1) of this section requires the Court to endorse on a money-lender's licence the order of cancellation thereof and the particulars of conviction which the money-lender has suffered ; and this sub-section enables the Court to compel production of the licence before him in order that the necessary endorsements may be made thereon. The Court can call upon the licence-holder to produce his licence before it in such manner and at such time as the Court may direct, and the licence-holder will be bound to comply with the requisition. If the licence-holder fails to produce the licence as directed by the Court without any reasonable cause, he commits an offence of which he can be convicted and directed to pay a daily fine not exceeding fifty rupees for each day of the period during which the default continues. Notice that the penalty prescribed by this sub-section is a *specific penalty* and section 42 says that where a *specific* penalty is prescribed for an offence, the person guilty of that offcnee should be punished with that specific penalty and no other penalty.

Sub-section (7): *Vide* notes at pp. 86 & 92, *ante*. It simply says that the powers conferred on a Court under sub-section (1) of this section may be exercised by a Court in appeal or in revision. For the powers of an appellate Court or a Court of revision, read the notes at p. 92, *ante*.

No compensation for cancellation of licence.

21. A person whose licence has been cancelled shall not be entitled to any compensation on such account nor to the refund of any licence fee paid in respect of such licence.

No compensation for the cancelled licence : The money-lender is not entitled to any compensation or to any refund of the licence fee in respect of his licence which has been cancelled by the Sub-Registrar under section 17 or by the Court under section 20. The prohibition of this section bars a suit for compensation or for refund of licence fee not only against the officers of the Crown but also against the borrower at whose instance the licence is cancelled inasmuch as the section does not say anything as to the person against whom a claim for compensation may be put forward. Under section 43, *post,* the officers of the Crown enjoy a general protection in respect of everything which they do or intend to do in good faith under the provisions of the Act. Although a borrower is not liable for compensation in respect of a cancelled licence by reason of the prohibition contained in this section, still that does not make him immune from a claim for damages for malicious prosecution of the money-lender under the general law.

Malicious prosecution : An action in damages lies against a person who starts a criminal prosecution against the plaintiff without reasonable and probable cause [*Crowdy* v. *O'Reilly,* 17 C.L.J. 105=17 C.W.N. 554=18 I.C. 737]. In an action for malicious prosecution the plaintiff has to prove (i) that he was prosecuted by the defendant ; (ii) that the proceedings complained of terminated in favour of the plaintiff if from their very nature they were capable of so terminating ; (iii) that the prosecution was instituted against him without any reasonable and probable cause and (iv) that it was due to a malicious intention of the defendant, and not with a mere intention of carrying the law into effect, *Bulbahadhar Singh* v. *Badri Sah,* 43 C.L.J. 521=30 C.W.N. 866=A.I.R. 1926 P.C. 46=95 I.C. 329 (P.C.). *Mauji Ram* v. *Chaturbhuj,* A.I.R. 1939 P.C. 225=183 I.C. 196, P.C.; *Karuppanna* v. *Haughtan* 59 Mad. 887=162 I.C. 794. In such a suit the plaintiff must prove damages to himself, in whatever form they may be; read the observations of *Holt C. J.* in *Saville* v. *Roberts* 1 Ld. Ray m. 374. Damages are given on two grounds, *first* on the ground of a *solatium* for injury to the feelings of the person prosecuted ; *secondly,* as a re-imbursement for legitimate expenses incurred by him in his defence, (*Rai*) *Jung Bahadur* v. (*Rai*) *Gudur Sahoy,* 1 C.W.N. 537 ; read also *Cotterell* v. *Jones,* (1851) 11 C.B. 713 ; *Cockburn* v. *Edwards,* (1881) 18 Ch.D. 449=51 L.J. Ch. 46 ; *Hicks* v. *Faulkner,* (1878) L.R. 8 Q.B.D. 167 ; *Mitchell* v. *Jenkins,* (1833) 5 B.Ad. 589. For the general principles governing such cases, read the decision in *Imperial Tobacco Co.* v. *Albert Bonnan,* 46 C.L.J. 455=A.I.R. 1928 Cal. 1=106 I.C. 277. The prosecution

must be actuated by *malice*, which means a mere *malus animus* or some improper motive and may be short of actual spite or hatred against the person prosecuted, *Vogiazss* v. *Pappademidtrious,* 20 I.C. 180 (Bur.) ; *Satyendra Chandra* v. *Abdul Manim,* I.L.R. (1938) 1 Cal. 202=181 I.C. 788. A prosecution may not be *mala fide* in the beginning ; but the continuance of such prosecution after it was discovered that the facts upon which it was based were not true may give rise to a claim for damages for malicious prosecution, *Rabindra Nath* v. *Jokendra Chandra,* 56 Cal. 432=48 C.L.J. 339=33 C.W.N. 79=A.I.R. 1928 Cal. 691=114 I.C. 796. As to whether notice can be inferred from the mere fact that prosecution has failed, see *Corea* v. *Peiris,* (1909) A. C. 549=14 C.W.N. 86=5 I.C. 50 (P.C.). As to what is reasonable and probable cause, and as to the test for it, see *Bapuji* v. *Kisan,* A.I.R. 1926 Nag. 175=89 I.C. 432 ; also *Nagendra Nath* v. *Basanta Das, infra.* The want of probable cause cannot be inferred from the mere evidence of malice, *Mohini Mohan* v. *Surendra Narain* 42 Cal 550=21 C.L.J. 68=18 C.W.N. 1189=26 I.C. 296 ; *Shama Bibi* v. *Chairman of Baranagore,* 12 C.L.J. 410=6 I.C. 675 ; *Chatra Serampore Co-operative Credit Society* v. *Becharam,* 42 C.W.N. 1219=A.I.R. 1938 Cal. 829 ; As to the meaning of the term, *prosecution,* see *Rabindranath* v. *Jogendra Chandra,* 56 Cal. 432=48 C.L.J. 339=33 C.W.N. 79=A.I.R. 1928 Cal. 691=114 I.C. 796. It does not bear any technical meaning, *Gursaran* v. *Israr Haidar,* A.I.R. 1927 Oudh, 471=105 I.C. 553. Prosecution is not commenced till summons is issued, *Nagendra Nath* v. *Basanta Das,* 57 Cal. 25=A.I.R. 1930 Cal. 392. See also, *Bishun Pergash* v. *Fulman Singh,* 20 C.L.J. 518=19 C.W.N. 985=27 I.C. 449 ; *Dhiraj bala* v. *Gopal Ch.,* 18 C.L.J. 352=20 I.C. 768 ; *Crowdy* v. *O'Reilly,* 17 C.L.J. 105=17 C.W.N. 105=18 I.C. 737 ; *Golap Jan* v. *Bholanath,* 38 Cal. 880=15 C.W.N. 917=11 I.C. 311 ; *Nagarmall* v. *Jhabarmall,* 60 Cal. 1022=A.I.R. 1933 Cal. 909=148 I.C. 1129. The burden of proving want of reasonable and probable cause is on the plaintiff and the existence of malice should be independently proved and can not be inferred merely from the absence of probable and reasonable cause, *Nurkhan* v. *Jiwan Das,* A.I.R. 1927 Cal. 120=99 I.C. 638. In an action for malicious prosecution, the plaintiff has to prove first that he was innocent and that his innocence was pronounced by the Tribunal before which the accusation was made, *Gobardhan Singh* v. *Rambadan Singh,* 44 All. 485=A.I.R. 1922 All. 209=67 I.C. 65. *Cf. Balbhaddar Singh* v. *Badri Sah, supra.* Where there is not an iota of evidence to suggest that the defendant ever went beyond

Burden of proof.

giving a true information of the criminal act, there is no liability for a so-called malicious prosecution, *Nagendra Nath* v. *Basanta Das, supra.* In a suit for malicious prosecution, the Criminal Court's finding as to plaintiff's innocence though *prima facie* strong evidence is not conclusive. The plaintiff has to prove his innocence, *Muchi Osta* v. *Horsmull Marwari,* 17 C.W.N. 434=19 I.C. 24, *Cf. Semaki Chutani* v. *Hemkanta Sarma,* 18 I.C. 830 (Cal.). See however *Emperor* v. *Noni Gopal,* 15 C.W.N. 646=11 I.C. 580; *Noni Gopal* v. *Emperor,* 38 Cal. 599=15 C.W.N. 593=10 I.C. 582.

Licence fees and penalties recoverable as public demands.

22. All licence fees and all penalties imposed under this Act shall be recoverable as public demands.

Recovery of licence fees and penalties as public demands : This section authorises the application of the provisions of the Public Demands Recovery Act, 1913 for the purpose of realising *all* license fees and *all* penalties imposed under the Act. The word "all" shows that the arrears are also included here. Provision for payment of licence fee has been made in section 10, but the payment contemplated therein has to be made in advance under sec. 12. Under sec. 44 (2) (e), the Provincial Government will have power to make rules prescribing the manner in which the licence fees and penalties are to be paid until such rules are framed, such fees and penalties can be received in cash or in stamp paper just in the manner of pleaders' licence. An advance payment being a condition precedent for the grant of licence, no question of realisation as a public demand can arise in relation thereto. The licence fees and penalties mentioned in the section must necessarily refer to the case where the money-lender does money-lending business without previously obtaining a licence and is subsequently penalised under sec. 13 of the Act. For the meaning of the expression "public demand", see sec. 3(6) of the Bengal Public Demands Recovery Act, 1913. Schedule 1 to the said Act specifies the various items of dues and moneys which can be regarded as public demands within the meaning of said sec. 3(6) of the P. D. R. Act. The licence fees and penalties referred to in this section having been made *recoverable* as public demands fall within the purview of Item No. 4 of Schedule 1 to the P. D. R. Act. This section says that the fees and penalties *shall be recoverable* as public demands and not that they are to be *recovered* as public demands. This means that recovery of these sums by other means than by the certificate procedure is not altogether

prohibited. As to the mode of filing and execution of certificates, read secs. 4, 13 and 14 of the P. D. R. Act.

It is quite a feasible argument to say that by making licence fees and penalties only *recoverable* as public demands, the section implies that these dues are not *public demands* for all purposes, and therefore the Provisions of the Public Demands Recovery Act, 1913 cannot be made applicable to them at every step ; but the provisions relating to "Execution of Certificates" contained in Part III of the Public Demands Recovery Act will apply to them, because such provisions are all matters relating to the question of *recovery*. The amounts of licence fees and penalties when realised will fall into the public coffers and, therefore, they will constitute Crown debts [see *Judah* v. *Secretary of State,* 12 Cal. 445 (452) ; *Gayanoda* v. *Butto Kristo,* 33 Cal. 1040=10 C.W.N. 857], and the liability in respect of them may remain even after the termination of the bankruptcy proceedings against the money-lender liable, consult sec. 44 of the Provincial Insolvency Act (V of 1920).

Offences in respect of licences.

23. (1) Whoever being disqualified for holding a licence, applies for or obtains a licence during the pendency of such disqualification, without disclosing the fact thereof, shall be punishable, on conviciion, with imprisonment which may extend to three months or with fine which may extend to five hundred rupees or with both, and any licence so obtained shall not be deemed to be an effective licence.

(2) Whoever obliterates or causes to be obliterated or attempts to obliterate an endorsement entered on a licence under this Act or abets such obliteration or attempt shall be punishable, on conviction, with imprisonment which may extend to three months or with fine which may extend to five hundred rupees or with both.

Offences in respect of licences : The section declares (1) an application for or procurement of a licence by a disqualified money-lender during the period of his disqualification without disclosing the fact of such disqualification and (2) obliteration of, attempt to obliterate, an endorsement on a licence, to be offences under this Act. If the money-lender being tried of such offences is found guilty and convicted, he will be punished in each case with imprisonment for a term extending to three months or with

fine extending up to Rs. 500/- or with both. A licence clandestinely or fraudulently obtained by a disqualified person cannot take effect as an *effective licence* within the meaning of the Explanation to sec. 8, *ante,* with the result that the holder of it is debarred from recovering a decree under sec. 13(1).

Applying for or obtaining a licence is an offence under sub-sec. (1) of the section only in relation to a money-lender who is disqualified for holding a licence. Under sec. 14 of the Act, a money-lender is disqualified for holding a licence only if he is so declared under sec. 20 for a period mentioned in the order thereunder, or if he is convicted of any offence specified in the Schedule of the Act. An application for, or procurement of, a licence is not *per se* an offence. They are offences only if the disqualification is concealed. It is incumbent on the disqualified money-lender to state in his application for licence that the order declaring him disqualified is subsisting. If the disqualification has been removed under the provisions of sub-sec. (2) of sec. 14, there is no necessity for the applicant for licence to state in his petition the fact of his sometime disqualification.

Under sub-sec. (2), obliteration, or abetment of obliteration, of, or attempt to obliterate, an endorsement entered on a licence *under this Act* is an offence. For obliteration of document as an offence under the Indian Penal Code, see sec. 204 of the said Code. From said sec. 204, it is evident that there may be obliteration although the endorsement in question is not rendered illegible. Obliteration of, or an attempt to obliterate, an endorsement on a licence is an offence irrespective of the question whether the obliteration is in respect of a person's *own* licence or of the licence of somebody else. The endorsement, obliteration whereof has been rendered punishable by sub-sec. (2) must have been made *under this Act ;* otherwise it is no offence hereunder. As to when endorsements are made on a licence, see sec. (2)(1)(b).

Attempt to obliterate an endorsement on a licence is as great an offence as an *actual* obliteration of the same. That is, an actual tapmering with an endorsement or an attempt to tamper with it are offences of equal magnitude. Therefore, where an attempt has been made to obliterate an endorsement on a licence, but it has proved unsuccessful or abortive, it will be no defence for a man to say that no actual obliteration has been made.

An **abetment** of the offence of obliteration or an attempt to obliterate a licence has been made indictable under the section.

On Conviction : These words show that there should be a regular trial on a charge framed under this section. The offence

contemplated by the section is bailable and the trying Magistrate can enlarge the accused on suitable recognisance.

Which Magistrate to try the offence : Under the last item of the Second Schedule of the Code of Criminal Procedure, an offence punishable with imprisonment for less than 1 year or with fine only is triable by *any Magistrate.* An offence committed under this section does not fall within the scope of the "penalties" contemplated in sec. 42 and therefore the restrictions on the trying Magistrates provided for by sub-sec. (4) of said sec. 42 seem to be inapplicable in relation to trials of offences under this section.

Who can make the complaint hereunder : The definition of the term "complaint" contained in sec. 4(1)(h) of the Code of Criminal Procedure shows that any person in the know of facts constituting an offence hereunder, although not injured, affected or aggrieved by it, may lodge a complaint under this section, Cf. *Dedar Bux* v. *Syamapada Mulakar,* 41 Cal. 1013=18 C.W.N. 921=21 I.C. 854. Sub-sec. (2) of sec. 42 has provided that only a Provincial Registrar or a Registrar or persons authorised by either of them can start a prosecution under said sec. 42, but as an offence contemplated by this section does not fall within the purview of the general penalty provision of sec. 42, it seems that the restrictive provisions as to the competency of a complaint contained in sec. 42 (2) of the Act will not apply in relation to an intending complaint hereunder.

Sentence : The section provides the same punishment for both the descriptions of offences respectively referred to in the two sub-sections, *namely,* imprisonment for a period up to three months or fine not exceeding five hundreed rupees or both. Non-specification of the character of imprisonment renders the offender liable to imprisonment of both descriptions, simple or rigorous, that is, without or with hard labour, but the term of imprisonment should not exceed *three* months on any account. The section provides for the infliction of a sentence of fine not exceeding five hundred rupees either in the alternative for, or in addition to, the term of imprisonment. The term of imprisonment may be partly rigorous and partly simple, see sec. 60 of the Indian Penal Code. This section prescribing a *specific* penalty, it will not be possible for the Court to inflict any other sentence than what has been prescribed herein.

CHAPTER IV.

Regulation of Accounts of Money-lenders.

Duty of money-lender to keep accounts.

24. (1) Every money-lender shall keep and maintain at least a cash book a ledger and a receipt book in such form or forms as may be prescribed and the same shall be written in Bengali or English in the regular course of business.

(2) Every money-lender shall—

(*a*) deliver to the borrower at the time a loan is advanced a statement in Bengali or English as the borrower may desire, in such form as may be prescribed and showing such details of the conditions of the loan and such other information connected therewith as may be prescribed;

(*b*) give to the borrower a plain and complete receipt for every payment made on account of any loan at the time of such payment;

(*c*) upon repayment in full of a loan mark indelibly with words indicating full payment or cancellation every paper signed by the borrower, and discharge any mortgage, restore any pledge, return any note and cancel any assignment given by the borrower as security.

(3) Notwithstanding anything contained in the Indian Evidence Act, 1872, a copy of the account referred to in sub-section (1) shall, if certified in such manner as may be prescribed, be admissible as evidence of the contents of such account.

Sub-sec. (1) : **Duty of money-lender to keep accounts :** This section obliges a money-lender to keep and maintain *at least* one cash-book, one ledger and one receipt book in a form or forms which may be prescribed by the Rules. These books should

be written in Bengali or in English *in the regular course of business*. The requirements of the section will not be complied with if such books are written in Kaithi, Urdu or some other foreign character. The rule of this sub-section is mandatory and not simply directory. Contravention of this rule renders the money-lender's licence liable to be cancelled under sec. 20, *ante*. The two words "keep" and "maintain" have been advisedly used to emphasise the fact that the mere fact of having cash-books, ledgers etc. will not absolve the money-lenders from his obligations imposed by the section. The money-lender should not only have these books but should get all necessary entries, and all developments of his business transactions duly noted in them and should record all necessary corrections and changes in his figures. The word "keep" refers to the fact of *preservation* and the word "maintain" implies that the books should be kept *in order* in conformity with the rules framed under sec. 44(2)(j). The words "at least" show that keeping and maintaining a cash-book, a ledger and a receipt book is the least thing that a money-lender should do.

Under this section it is necessary that the books referred to should be kept *in the regular course of business*. A book of account may be said to be *regularly* kept although the book is not entered up from day to day or from hour to hour as the transactions take place, *Chandreshwar Prasad* v. *Bisheswar*, 5 Pat. 777. It is sufficient if the entries are made at a time, when the transactions are still fresh in mind ; read the observations of the Judicial Committee in *Deputy Commissioner of Bara Banki* v. *Ram Parshad*, 27 Cal. 118=4 C. W. N. 147 (P. C.)—disapproving *Muncherashaw* v. *New Dharumsey L. W. Co.* 4 Bom. 576. Although the entries need not exactly synchronise with the transactions, still it is necessary that there should be a certain amount of regularity in the matter of making the entries. This regularity is a guarantee for their accuracy because it raises a presumption that the facts were fresh in one's recollection when the entries were made. Under sec. 34 of the Indian Evidence Act entries in books of account regularly kept in the course of business are relevant for the purpose of proving the facts referred to in the entries, but they are not sufficient to fix a man with liability in absence of corroborative evidence. As to the meaning of the term "business", *vide* notes at p. 35, *ante*. The expression "course of businesss" means the current routine of business usually followed by the money-lender, see *Ningawa* v. *Bharmappa*, 23 Bom. 63 (70) —referred to in *Sheonandan Singh* v. *Jeonandan Dusadh*, 13 C.W.N. 71 (73). Read also *Raja Gopal* v. *Subbammal*, 51 Mad. 291=A.I.R. 1928 Mad. 180=109 I.C. 153 ; *Crown* v. *Ramchand*, 19 I.C. 534.

"Every" money-lender in the section means every registered or un-registered money-lender. A money-lender cannot get out of the effect of this section by a plea that he is not a registered money-lender.

Sub-sec. (2) : Duty of money-lender to deliver detailed statements of loan, to grant receipt and to deface instruments of loan on payment etc. : In the three clauses (a) (b) and (c) of this sub-section, the statute requires a money-lender to deliver, at the time of the loan, to the borrower a detailed statement of the terms and conditions of the loan and other relevant informations relating thereto in accordance with the prescribed rules either in Bengali or in English as the borrower may desire, as also to grant him a regular receipt for every payment made in respect of the loan and to deface or cancel the documents of loans which are repaid, and return the securities if there be any. The **conditions** of the loan refer to such circumstances as whether the loan is by way of renewal of a previous loan, [see *Lyle Ltd.* v. *Chappell,* (1932) 1 K.B. 691, C.A.=101 L.J.K.B. 185. The provisions of this sub-section too, like those of sub-sec. (1), are mandatory and not merely directory. Non-fulfilment of this statutory obligation brings the money-lender within the peril of sec. 20 and renders him liable to forfeit his interest under sec. 27 (b), *post.* It is not necessary for the purposes of this section that the *statement* contemplated herein should be in the form of a bound pass-book as is the practice with the Banks.

The statement specifying the details of the conditions of the loan and the other relevant informations required by the Rules to be supplied should be delivered to the borrower at the time of advancing the loan. The statement should be in Bengali or in English according to the option of the borrower. A statement in any other character is no compliance with the statute. If the borrower does not express his choice as to the language in which the statement is to be granted, the money-lender is free to give it either in Bengali or in English according to his own prediliction. Even if the borrower knows neither English nor Bengali he cannot insist on a statement in any other language.

Under clause (b) of the sub-section the money-lender is bound to give a receipt to the borrower every time he makes a payment on account of a loan. If the payment is on account of a loan, a receipt must have to be given and it does not matter whether it is towards the principal or the interest. As to the meaning of the term *receipt,* one would do well to consult the definition of the term as contained in sec. 2 (23) of the Indian

Stamp Act, 1899. The obligation to give receipt hereunder does not replace the obligation to give receipt under sec. 30 of the Indian Stamp Act. Any refusal or neglect to give receipt under that section is punishable under Sec. 65 of that Act, *Empress* v. *Khetter Mohan,* 4 C.W.N. 440.

When the loan is *fully* repaid, it will be the duty of the money-lender to make indelible endorsements of full payment or cancellation on every sheet of paper which the borrower had executed in his favour and to return all the securities of the borrower. This obligation of the money-lender arises only if the loan is paid *in full* and not otherwise. As to the meaning of the term *"cancellation", vide* notes at p. 85, *ante.* The words indicating cancellation or full payment must be *indelibly* written out. So mere pencil notes may not serve the purpose.

Sub-sec. (3) : Copy of account, if certified, is admissible in evidence : The account papers referred to in sub-sec. (1) are all private documents and under sec. 76 of the Indian Evidence Act, certified copies are available only of *public* documents. But this provision of the Indian Evidence Act will not stand in the way of certified copies being granted of the aforesaid *private* documents of a money-lender or of such certified copies being used in evidence exactly in the same manner as certified copies of public documents are used in evidence. In order to make such certified copies of the money-lenders' accounts evidence, it is necessary that the certified copies should be granted in the manner prescribed by the Rules. Rules in this behalf can be made only under the provisions of sub-sec. (1) of sec. 44 and not under sub-sec. (2) of that section (sec. 44), because said sub-sec. (2) does not contain any reference to the present sub-sec. (3) of sec. 24.

Breach of duties hereunder : The duties prescribed by the section are all mandatory and this has been emphasised by the use of the word "shall" in both sub-sections (1) and (2) of the section. Contravention of the imperative provisions hereof will constitute an offence within the meaning of sec. 42 of the Act and triable thereunder. Non-compliance with the provisions of this section will also disentitle the money-lender to his interest and costs of suit for recovery of his money, see sec. 27 (b), *post.*

Money-lenders to furnish statements of accounts.

25. (1) Every money-lender shall, within two months of the commencement of each year, furnish each of his borrowers with a legible statement of accounts in Bengali or English as the borrower may desire signed by the

money-lender or his agent and showing the amount outstanding against the borrower: such statement shall be in the prescribed form and shall show—

(*a*) the amounts of principal and interest due to the money-lender at the commencement of the year;

(*b*) the amounts of any sums advanced to the borrower from time to time since the commencement of the year and the dates on which they were advanced;

(*c*) the amounts of any payments received from the borrower since the commencement of the year in respect of loans outstanding and the dates on which they were received;

(*d*) the amount of every sum due from the borrower remaining unpaid and the date on which each such sum became due and the amount of interest accrued due and unpaid in respect of every such sum;

(*e*) the amount of every sum not yet due which remains outstanding and the date upon which each such sum will become due; and

(*f*) such other particulars as may be prescribed.

(2) In respect of any particular loan, whether advanced before or after the commencement of this Act, a money-lender shall, on demand being made in writing by the borrower at any time while the loan or any portion thereof remains outstanding, supply to the borrower or to any person specified in that behalf in the demand, within thirty days from the date of receipt of the written demand by the money-lender or his duly authorised agent, a statement in Bengali or English as the borrower may desire, signed by the money-lender or his agent and showing in the prescribed form any or all of the particulars specified in sub-section (1):

Provided that the money-lender shall not be bound to comply with such demand if he has complied with a demand made not more than six months prior to the date thereof, or if within such period of six months he has furnished the statement required by sub-section (1).

(3) A money-lender shall, on a demand in writing by the borrower, supply to the borrower or to any person specified in that behalf in the demand a copy of any document evidencing an agreement to secure repayment of a loan advanced to the borrower:

Provided that a money-lender shall not be bound to comply with such a demand if he has previously furnished the borrower with such copy, except on payment of such fee as may be prescribed.

(4) In this section the expression "year" means the year for which the accounts of the money-lender are ordinarily maintained in his own books.

Statements of accounts to be furnished by money-lenders: Under this section every money-lender is bound, within the course of the first two months of each year, to supply each of his borrowers with a statement of accounts specifying the various particulars mentioned in the five clauses [cls. (a) to (e)] of sub-sec. (1). This statement of accounts should be in *legible* handwriting and should be in Bengali or in English according to the option of the borrower. It must be signed by the money-lender himself or by his agent and must be in respect of the amount outstanding against the borrower. If the money-lender or his agent is an illiterate person, the statement of accounts in question may be affixed with his mark, [see sec. 3 (41) of the Bengal General Clauses Act (1 of 1899, B. C.)]. The word "year" ordinarily means a year reckoned according to the British Calender [see sec. 3 (48) of the Bengal General Clauses Act, 1 of 1899, B. C.], but in this section, the word "year" is not to be taken in that ordinary sense, because it is quite permissible for the Legislature to depart from the definition given in the said General Clauses Act, in a particular enactment. This is exactly what has been done in this particular case. In sub-sec. (4) of this section it has been distinctly provided that the term "year" in this section means the year for which the accounts of the money-lender

Sub-section. (1).

are ordinarily maintained in his own books. From said sub-sec. (4), it is clear that the "year" as understood in this section may vary with different money-lenders of the Province, but one individual money-lender cannot ordinarily have different years in relation to different borrowers; of course, there is absolutely no bar to the money-lender maintaining accounts with reference to different years. The particulars which a statement of accounts should contain are as follows:—(a) the amounts of principal and interest due to the money-lender at the commencement of the year, (b) subsequent advances to the borrower together with their dates, (c) payments since received on account of the outstanding dues of the loan from the commencement of the year up to the date of the statement, (d) the net outstanding dues together with the interest accruing, but remaining unpaid specifying what sum became due on what date, (e) the amount of every sum not yet due which remains outstanding and the date on which each sum will become due. It seems that the provisions of sub-sec. (1) are not retrospective, that is, the obligation to furnish an annual statement under sub-sec. (1) exists only in respect of the loans advanced after the commencement of this Act. This will be apparent from a comparison of the wordings of sub-sec. (1) with those of sub-sec. (2). The provisions of this section should be compared with those of sec. 7 of the Bengal Money-lenders Act of 1933, under which particulars of the loan are to be supplied only on demand by the borrower; but under this section such supply of particulars is annual, compulsory and irrespective of the question of demand.

Sub-sec. (2).

In addition to annual statement which the money-lender has to furnish under the provisions of sub-sec. (1), he is also bound to furnish further statements of accounts, specifying the particulars in the clauses (a) to (e) of sub-sec. (1), on the requisition of the borrower. The obligation to furnish statements of accounts on the requisition of the borrower subsists in respect of every loan, whether advanced before or after the commencement of this Act. In this respect, as seen above, the money-lender's obligations under sub-sec. (1) and this sub-section substantially differ according as the loan was advanced before or after the commencement of the Act. The borrower's requisition under sub-sec. (2) should be drawn up in the form of a **demand notice** *in writing* and can be made so long as the loan or some part of it remains outstanding. If the loan has been repaid, the borrower cannot send a demand notice as contemplated herein. An oral demand is not permitted by the statute and can be ignored by the money-lender. Sub-sec. (2) makes compliance with the borrower's demand notice

imperative, by using the word *shall.* The demand notice is to state whether the money-lender is to supply the particulars wanted to the borrower himself or to some nominee of his. If the demand notice says that the money-lender is to supply the particulars to the borrower's pleader, the former will be bound to obey the direction. The statement may be supplied within thirty days from the date of receipt of the written demand although the notice has fixed a shorter period for the purpose. In computing these thirty days, the date on which the money-lender or his duly authorised agent receives the demand notice is to be excluded. If the demand notice was not received by the money-lender or his duly authorised agent at all but was received by an ordinary agent who was not duly authorised to receive the notice, this period of thirty days does not commence to run at all. Where a controversy ensues as to whether an agent was a duly authorised agent or not, the onus will be on the money-lender to prove that the agent had no authority, inasmuch as this is a matter which is peculiarly within his knowledge. [Comp. *Sudaman Jamadar* v. *Behari Mahton,* 15 C.W.N. 953; *Srikrishna* v. *Jeshasi,* 45 I.C. 294; *Monmotha* v. *Rajeswar,* 55 Cal. 355=32 C.W.N. 184]. If the money-lender does not satisfactorily discharge this onus, the ordinary presumption of law that notice to an agent is notice to the principal will apply. The statement to be supplied in compliance with the demand notice should be in Bengali or in English according to the option of the borrower, and the money-lender will have no option in the matter. The borrower however cannot dictate that the statement should be in some other character than either Bengali or English. If the borrower does not exercise his choice as between English or Bengali, the money-lender can exercise discretion in using either one of these two characters, but he shall have no option to supply the statement in any other language. The statement is to be supplied over the signature of the money-lender or his agent. Notice that in relation to such agent the expression "duly authorised" is not used. This is simply because of the fact that when the money-lender has allowed the agent to sign, that by itself carries with it the implication of due authority. The particulars to be mentioned in the statement are as under sub-sec. (1).

Under the *Proviso* to sub-sec. (2), the money-lender is exonerated from the obligation to supply statement on the requisition of the borrower, if he has already complied with another demand of the borrower within six months of the requisition in question or if he has supplied the annual statement under sub-sec. (1) within that period.

Sub-sec. (3) : **Obligation of money-lender to supply copy of the deed of agreement to secure repayment :** If a borrower makes a requisition *in writing*, the money-lender will, in compliance with such requisition, be bound to supply to the borrower or to any person mentioned in the requisition (*e.g.* the borrower's pleader or other agents) a copy of any document executed by the borrower as evidence of his agreement to repay his loan. The copy requisitioned by the borrower is to be supplied free of costs, but a free copy can be supplied only once. If the borrower has already been given one copy, he will have to pay for all subsequent copies of the document in question, should he require them. The fee which the borrower will have to pay for subsequent copies will be as has been fixed by the Rules.

Analogous Law : *Vide* section 7 of the Assam Money-lenders Act and section 8 of the English Money-lenders Act, 1927.

Borrower not bound by money-lender's statement of accounts.

26. A borrower to whom a statement of accounts has been furnished under section 25 shall not be bound to acknowledge or deny its correctness, and his failure to do so shall not, by itself, be deemed to be an admission of the correctness of the account.

Non-refutation of statement of accounts is no admission of its accuracy: The law does not oblige the borrower to whom a statement of accounts has been furinshed under sec. 25 either to acknowledge or deny its correctness. Therefore, if he does not say anything either to affirm or to challenge the accuracy of the statements furnished to him, his silence by itself will not raise any presumption against him, and will not be reckoned as constructive admission on his part as to the accuracy of the statements. This is in accordance with the rule of equity that when no duty has been cast on a person to speak out, his silence will not bind him by any rule of estoppel. There are cases in the English report where the silence of a party from the very nature of the transaction or from the surrounding circumstances is taken as equivalent to his direct affirmation, [comp. *Summers* v. *Grifiths,* 35 *Beav.* 27; *Seaton* v. *Burnand,* 1900 A.C. 135; *London Assurance Co.* v. *Mansel,* 11 Ch. Div. 363]. The object of the present section is to render the rule of all these cases inapplicable to a borrower under this Act by exonerating him from the duty of speaking out. The section, however, does not abrogate the rule as to silence operating as affirmation *in toto ;* and has, therefore, introduced the qualification "by itself". This means that the

borrower's silence will not *per se* amount to a constructive affirmation of the accuracy of the statements of accounts ; but taken along with the other circumstances of the case may sometimes operate as such an admission.

Inadvertent mistakes in the statement how far binding on the money-lender: If a money-lender in furnishing statements inadvertently (and not fraudulently) commits mistakes therein, the Court will not pin him down to his own statement, but allow him to lead evidence to establish the mistake. The first proviso to sec. 92 of the Indian Evidence permits a man to adduce such evidence; consult *Freeman* v. *Raul,* 12 W.R. 532; also *Kota China* v. *Kanne Kanti,* 3 L.W. 551=31 I.C. 671 ; *Abdul Hakim* v. *Ram Gopal,* 20 A.L.J. 53 ; *Sabaje* v. *Nawal Singh,* A.I.R. 1928 Nag. 4 =104 I.C. 736. The erroneous statement is at the utmost an admission, but it is not conclusive proof of the matter admitted [see sec. 31 of the Indian Evidence Act] ; therefore, except where erroneous statement operates as an estoppel by reason of the Doctrine of Changed Situation, a Court of Equity will always allow the mistake to be established by evidence and relieve the party of his inadvertence. The erroneous statement cannot be placed on the foot of a mere unilateral mistake which is insufficient to avoid a contract under sec. 22 of the Indian Contract Act, inasmuch as the statement of accounts is simply an admission at the utmost and is no contract within the meaning of the Indian Contract Act. The Calcutta decision of *Pratap Chandra* v. *Mahomed Ali,* 41 Cal. 342=19 C.L.J. 66=18 C.W.N. 592=20 I.C. 443, which is a case of omission *in a contract* does not militate against the view expressed above.

Errors and omissions in receipts and statements under the respective sec. 24 and sec. 25, if neither material nor fraudulent, will not detract from the legal effect of those documents, *vide* the *Explanation* to sec. 27, *post.*

Effect of non-compliance with the provisions of Sec. 24 & 25 : In every suit for recovery of money due on a loan, a statutory issue has to be framed by the Court as to whether the money-lender has complied with the provisions of sections 24 and 25, and this issue should be decided before the Court will proceed to decide the plaintiff's claim on its merits. If the Court finds that these provisions have not been complied with it may disallow the plaintiff's claim for interest either wholly or in part and can also disallow the plaintiff his costs of the suit. Contravention of the provisions of these section has also been made penal by section 42, *post,* and the money-lender can be convicted on that account under the said section.

Procedure in suits relating to loans by money-lenders.

27. Notwithstanding anything contained in any law for the time being in force, in any suit to which this Act applies—

(*a*) a Court shall, before deciding the claim on its merits, frame and decide the issue whether the money-lender has in respect of the claim in suit complied with the provisions of section 24 and 25; and

(*b*) if the Court finds that the provisions of either of the said sections have not been so complied with, it may, if the plaintiff's claim is established either wholly or in part, disallow the whole or such portion of the interest found due as may, in the circumstances of the case, appear reasonable to the Court, and may also disallow costs, or in computing the amount of interest due upon the loan, the Court may exclude any period for which the money-lender omitted to comply with the provisions of either of the said sections:

Provided that if the money-lender has, after the time specified in the said sections, given the receipt or furnished the statement, as the case may be, and if he satisfies the Court that he had sufficient cause for not doing so earlier, the Court may include any such period in computing the interest.

Explanation.—A money-lender who has given a receipt or furnished a statement in the prescribed form shall be held to have complied with the provisions of section 24 or section 25, as the case may be, in spite of any errors and omissions in such receipt or statement, if the Court finds that such errors and omissions are neither material nor made fraudulently.

Special Procedure for Suits relating to loans: The Act provides in this section a special procedure for suits referred to in sec. 2(22) thereof in respect of a particular matter. A preliminary issue has to be raised in every case as to whether there has been compliance with the provisions of secs. 24 and 25 of the Act and if not what would be the legal consequence of the default. Such an issue automatically arises in every suit which is amenable to the provisions of this Act, irrespective of the question whether there is any warrant for it from any other enactment in force in the Province or whether it arises upon the pleadings of the parties. This position has been made clear by the opening words of the section, namely, "Notwithstanding anything contained in any law for the time being in force." The words "for the time being in force" refer to the existing laws and not the laws to be enacted hereafter.

Small Cause Court Suits.

The obligation to raise the statutory issue contemplated in the section is of an imperative character and its violation is a serious defect and irregularity in the proceedings of the Court vitiating the whole judgment and may be set right on appeal or revision as the case may be. *Vide* notes under the heading "Appeal or Revision", *post*. The obligation to raise the statutory issues remains even if the Court trying the suit be invested with S. C. C. powers, because by reason of the opening reservation of this section, the contrary provisions of the Small Cause Courts Act have been put into the background. Although the provisions of Or. XIV of the C. P. Code relating to framing of issues have been made inapplicable to the Presidency Small Causes Court and the Provincial Small Cause Courts respectively by Orders LI and L of the Code, still it will be obligatory upon these Courts to raise the statutory issue contemplated by this section.

Clause (a) of the section requires that this statutory issue is to be decided before the Court proceeds to try the case on merits with reference to the respective pleadings of the parties, and **clause** (b) says that if the Court finds that the provisions of secs. 24 and 25 have not been complied with by the money-lender, it *may* (1) disallow the plaintiff's claim for interest either wholly or in part either by making a lump reduction or by excluding from computation of interest the particular period for which the provisions of sec. 24 and 25 remained uncomplied with, and may also (2) disallow the plaintiff's costs of the suit. Notice the word *may* in the section, which indicates that the Court's power of disallowing interest and costs is only discretionary; but as judicial discretion has always to be exercised on fixed legal principles and

not arbitrarily, the Court should ordinarily, in absence of any extenuating circumstance, give effect to the provisions of clause (b) and disallow the interests and costs. One such extenuating circumstance has been contemplated in the Proviso to clause (b), which says that if the money-lender grants a receipt or furnish a statement after the time specified in secs. 24 and 25, and satisfactorily accounts for the delay, the Court will not exclude the period of non-compliance from computation of interest with reference to time. It should be noticed that the Proviso only excuses a belated grant of receipt or a belated supply of statement; that's too only on the ground of sufficient cause. From this, it may fairly be concluded that it has not been the intention of the Legislature to excuse absolute non-compliance with provisions of secs. 24 and 25, on any pretext whatsoever; and the Court, in the exercise of its discretion under clause (b) in the matter of disallowance of interests and costs should always take this fact into consideration. As to what may be regarded as a *sufficient cause* within the meaning of the Proviso, no hard and fast rule can possibly be laid down; every case will have to be decided with reference to its peculiar circumstances.

Effect of errors or omissions in receipts and statements.

Explanation: If a money-lender complies with the provisions of secs. 24 and 25 and grants receipts or furnishes statements in accordance with the directions contained in them, no evil consequence will be visited on him simply because of the fact that errors and omissions have crept into them, provided they are neither material nor made fraudulently. As to how far the inadvertent errors and mistakes in the receipts and statements are binding on the money-lender, read the notes and cases at p. 109, *ante*. A money-lender will get the protection of the *Explanation* only if the errors and omissions are neither material nor made fraudulently. If the receipts and statements are wanting in very material particulars or contain fraudulent entries, the money-lender loses the benefit of the *Explanation*. Errors and omissions in respect of *material particulars* only go to show that the money-lender has been very perfunctory and grossly negligent in the performance of his statutory duties and therefore no protection has been given in the *Explanation* in respect of them. As regards the fraudulent entries and omissions, there is hardly any necessity for making any comment. Fraud vitiates everything and withholds the operation of law. As to what errors and omissions are material and which of them have or have not been fraudulently made, the Court of fact will decide the same on the facts and circumstances of each individual case.

Time when the statutory issue should be decided: The statutory issue contemplated by clause (a) of the section has to be decided *before* the plaintiff's claim is decided on its merits. This does not mean that it is incumbent upon the Court to decide the statutory issue as a preliminary issue before the necessary steps are taken to make the suit ready for hearing. So, the Court commits no irregularity if it defers its decision on the statutory issue till the actual hearing of the case commences or the Court starts recording of evidence. All that the section requires is that the Court should give its decision on the statutory issue before proceeding to decide the case on its merits. The statutory issue cannot be decided without investigation of certain facts as to compliance or non-compliance with the provisions of sections 24 and 25, and it will be perfectly legitimate for a Court to record evidence on all the facts at issue in the suit and to hear the arguments of the respective parties and then to give its judgment, and there will be sufficient compliance with the statute if the statutory issue is considered as the first point in the judgment. In cases open to appeal it is always a safe principle not to try piecemeal the issues raising mixed questions of fact and law, otherwise repeated appeals and remands might become necessary subjecting the parties to severe harassment and expenses, see *Tarakant Banerjee* v. *Puddomoney*, 10 M.I.A. 476 ; *Rai Jatindra Nath* v. *Hari Charan*, 20 C.L.J. 426 ; *Mahomed Solaiman* v. *Birendra Ch. Singh*, 50 Cal. 243=27 C.W.N. 749 (P.C.)—followed in *F. A. Shihan* v. *Abdul Alim*, 34 C.W.N. 1129 (1141).

Appeal and Revision: Contravention of the mandatory provisions of this section is a serious defect or irregularity in the proceedings of the Court vitiating its whole judgment. Therefore, such a defect or irregularity may be made a good ground for reversal of the judgment on appeal. Even when the Court's judgment is not open to any appeal as in the case of Small Cause Court suits, such defect or irregularity may be made a ground of attack against the judgment even in revision under section 25 of the Provincial Small Cause Courts Act or under section 115 of the Civil Procedure Code (if that section otherwise applies). The irregularity goes to the root of the whole thing and in a way affects the question of the Court's competency or jurisdiction to give a proper decision on the merits of the case, and is not curable by the provisions of section 99 of the Code of Civil Procedure because (1) the opening reservation of this section, *viz.*, "Notwithstanding anything contained etc," excludes the operation of sec. 99 of the C. P. Code and (2) said sec. 99 is ineffective to cure an irregularity affecting the merits of a case or the jurisdiction of the Court.

CHAPTER V.

Assignment of loans.

Notice and information to be given on assignment of loans by lenders.

28. (1) Where any debt in respect of—

(*i*) a loan advanced by a lender, whether before or after the commencement of this Act, or

(*ii*) interest on any such debt, or

(*iii*) the benefit of any agreement made, or security taken, in respect of any such debt or interest—

is assigned to any person, the assignor (whether he is the lender by whom the loan was advanced or any person to whom the debt has been previously assigned) shall, before the assignment is made,—

(*a*) give to the assignee notice in writing that the debt, interest thereon, agreement or security is affected by the operation of this Act, and

(*b*) where the debt is in respect of a loan advanced by a money-lender, supply to the assignee in such form as may be prescribed all information as to the state of the loan together with copies of documents relating thereto.

(2) Any person who acts in contravention of any of the provisions of this section shall be liable to indemnify any other person who is prejudiced by the contravention and shall also be punishable, on conviction, with imprisonment which may extend to one year or with fine which may extend to one thousand rupees or with both.

(3) In this section the expression "assigned" means assigned by an assignment *inter vivos* other than an assignment by operation of law; and the expressions "assignor" and "assignee" have corresponding meanings.

The Section : The section is analogous to section 16 of the English Money-lenders Act of 1927 and obliges a lender, whether of money or of kind, and whether he is the original lender who advanced the loan or a mere subsequent assignee from the original lender, who is desirous of effecting an assignment of his interest in the loan, to give certain informations regarding the conditions and circumstances of the loan to his intending assignee on pain of penalties both civil and criminal. The section applies to lenders whether of money or of kind. The informations that have to be given to the assignee have been specified in clauses (a) and (b). Clause (a) applies to both money-lender and kind-lender and clause (b) applies only to a money-lender. [Notice the general word "lender" in clause (i) and the word "money-lender" in cl. (b)]. Under cl. (a), the lender (whether of money or of kind) should give a *written* notice to the assignee intimating that the debt, interest, agreement or security sought to be assigned is affected by the operation of the Act. In the case of a money-lender, in addition to the above notice, the intending assignor is to supply informations as to the state of the loan and copies of documents of the loan.

Assignment of Loans: Loans, as understood in this Act, mean advances, whether of money or in kind, made on condition of repayment with interest [see sec. 2(12), *ante*]. In this sense debts due in respect of Loans are actionable claims within the meaning of sec. 3 of the Transfer of Property Act and transferable under sec. 130 of the said Act. The debt in respect of a loan is to be transferred in the manner laid down in the said S. 130 of the T. P. Act. The object of the Legislature in enacting the present section is not to supersede that provision of the Transfer of Property Act, but to prescribe certain formalities which the assignor of a loan is required to observe as a preliminary to an intended assignment. After the preliminary formalities as laid down in this section have been observed, the actual transfer is to be effected in accordance with the provisions of the T. P. Act. Under sec. 8 of the Transfer of Property Act, transfer of a debt does not carry with it the transfer of arrears of interest ; that is why transfer of interest has been separately mentioned in sub-sec. 1 (ii). A debt may be separated from the security [see *Imperial Bank* v. *Bengal National Bank*, 58 I.A. 323=54 C.L.J. 117=35 C.W.N. 1034 (P. C.) ; *comp* Rankin C.J.'s observations in *Imperial Bank* v. *B. N. Bank*, 58 Cal. 136=53 C.L.J. 269=131 I.C. 689] and they may be separately assigned.

Sub-sec. (1) : Preliminary formalities of assignment of loans: When the debt in respect of (1) a loan advanced at any

time, that is, whether before or after the commencement of the Act, or (ii) interest on any such debt or (iii) the benefit of an agreement made or security taken, is assigned, the assignor should, before making the assignment, give a *written* notice to the intending assignee to the effect that the debt, interest, agreement or security in question is affected by the operation of the Act and should also supply, if the debt is in respect of a loan advanced by a money-lender, to the assignee all informations as to the state of the loan and copies of documents relating thereto in the manner as laid down in the Rules.

The provision for service of notice and supply of informations contained in sub-sec. (1) applies to the assignment of a loan even if the loan was advanced before the Act came into force, and even if the assignment is made not by the original lender but by a person who himself since took an assignment from the original lender. The notice to be given under clause (a) should be *in writing* and should state that the debt, interest thereon, agreement or security in question is affected by the operation of this Act. Clause (b) of sub-sec. (1) requires the intending assignor to supply to the intending assignee all informations as to the *state* of the loan and copies of documents relating thereto, *if it be a case of a debt in respect of a loan advanced by a money-lender*. The informations are to be supplied in the form prescribed by the Rules. Notice that sub-clause (i) makes use of the term "lender", whereas sub-clause (b) speaks of a "money-lender" and remember that the term "lender" is wider than and includes a money-lender ; see sec. 2(9), *ante*.

Sub-sec. (3).

The provisions of this section apply only in cases of assignments *inter vivos* and by act of parties and not in the cases of involuntary assignments or assignments by operation of law (*ex lege*). Testamentary assignments or assignments by means of wills are not within the contemplation of the section. Cf. sec. 16(2) of the English Act.

Sub-sec. (2) : **Indemnity and Penalty :** If an assignor, be he the original lender or a subsequent assignee from the original lender, effects an assignment of the debt due in respect of a loan or of the interest due with respect thereto or the benefit of an agreement in relation thereto, but omits to give a written notice of the loan being affected by the operation of the Act or to supply informations and copies of documents as required respectively by the clauses (a) and (b) of sub-sec. (1), will be acting in contravention of the provisions of this section, and if such contravention of the statute prejudicially affects the interests

of any other person, such latter person can hold the assignor liable in damages for his illegal act. Omission to give notice and to supply informations and copies have also been declared by sub-sec. (2) to constitute an offence of which the assignor can be convicted. The words "on conviction" show that there should be a regular trial on a charge framed under this section. The punishment to be awarded for an offence hereunder is imprisonment for a term which may extend to one year, or it may consist of fine only or of both imprisonment and fine. Non-mention of the character of imprisonment renders the assignor liable to imprisonment of both descriptions, simple and rigorous, that is, without or with hard labour, but the term of imprisonment should not exceed one year on any account. The sentence of fine may be in the alternative for, or in addition to, the term of imprisonment. The maximum amount of fine for contravention of the provisions of this section is Rs. 1000/-. It may be mentioned here that when a special offence is created by a statute and the mode how the penalty is to be imposed is also provided for in that statute, it can only be imposed in the mode provided therein and in no *other mode*, *A. T. Ganguly* v. *Watson,* 53 Cal. 929=44 C.L.J. 350=98 I.C. 116—referring to *Queen* v. *Cubitt,* (1889) 22 Q.B.D. 622. Notice that contravention of the section entails both civil and criminal liabilities.

The prejudice contemplated by this section may affect the assignee, as also the borrower. The assignee while suing on the loan should implead his assignor, and if such assignor is not the original lender, then also the latter (i.e. the original lender), and ask for damages by way of indemnity against him. If the contravention of the section results in a prejudice to the borrower, then such borrower, when sued by the assignee upon the loan, may take out a Third Party Notice for indemnity against the lender in the manner in which such notice was taken out in *Finegow* v. *Cornelius,* (1916) 2 K.B. 719, or may compel the assignee to implead the lender as a party defendant, so that the necessary order for indemnity may be made in favour of the borrower and as against the lender in the very same suit.

Application of Act as respects assignees.

29. (1) Subject as hereinafter provided, the provisions of this Act shall continue to apply as respects any debt due to a lender or money-lender in respect of loans advanced by him after the commencement of this Act or in respect of interest on such loans or of the benefit of any agree-

ment made or security taken in respect of any such debt or interest, notwithstanding that the debt or the benefit of the agreement or security may have been assigned to any assignee, and except where the context otherwise requires, references in this Act to a lender or money-lender shall accordingly be construed as including any such assignee as aforesaid:

Provided that, notwithstanding anything contained in this Act—

(*a*) any agreement with, or security taken by, a lender or money-lender in respect of a loan advanced by him after the commencement of this Act shall be valid in favour of any *bona fide* assignee or holder for value without notice of any defect due to the operation of this Act and of any person deriving title under him; and

(*b*) any payment or transfer of money or property made *bona fide* by any person, whether acting in a fiduciary capacity or otherwise on the faith of the validity of any such agreement or security, without notice of any such defect shall, in favour of that person, be as valid as it would have been if the agreement or security had been valid;

but in every such case the lender or money-lender shall be liable to indemnify the borrower or any other person who is prejudiced by virtue of this section, and nothing in this proviso shall render valid an agreement or security in favour of, or apply to proceedings instituted by, an assignee or holder for value who is himself a moneylender.

(2) The provisions of this Act shall apply and be deemed always to have applied and shall continue to apply as respects any debt due to a lender or money-lender in respect of loans advanced by him

before the commencement of this Act or in respect of interest on such loans or of the benefit of any agreement made or security taken in respect of any such debt or interest, notwithstanding that the debt or the benefit of the agreement or security may have been assigned to any assignee, and except where the context otherwise requires, references in this Act to a lender or money-lender shall accordingly be construed as including any such assignee as aforesaid.

(3) Nothing in this section shall render valid for any purpose any agreement, security or other transaction which would, apart from the provisions of this Act, have been void or unenforceable.

The Act applies to assignees of debts contracted after the commencement of the Act : The provisions of this Act have been rendered applicable to the assignees of debts due in respect of loans advanced whether before or *after the commencement of the Act* or to the assignees of interest due in respect of such debts or of the benefit of any agreement made or security taken in respect of any such debt. Consequently, wherever the word "lender" or "money-lender" has been used in the Act, the term will include his assignee unless the context in which the term occurs shows a contrary intention. One instance of such a contrary intention will be found in sub-sec. (5) of sec. 13, *ante.* There the word "money-lender" would include his assignee only if the assignment was effected with the object of avoiding the payment of licence fee ; otherwise, in said sec. 13, the term "money-lender" would not include his assignee. It may be mentioned that the position of the assignee under sec. 4 of the Bengal Money-lenders Act (VII of 1933) is different [see *Aunar Ali* v. *Jebar Mallick*, 43 C.W.N. 495]. This Act makes a departure from the principle of the Act of 1933, and repeals the same by its sec. 45 *to some extent.* Therefore, the principle on which the case of *Aunar* v. *Jebar Mullick* was decided will not any more hold good. Although, the provisions of the Act have been made applicable to asignees of the debts irrespective of the question whether the loan was advanced before or after the commencement of the Act, still a distinction is made in the position of the assignees according as the loan was advanced before or after the commencement of the Act.

The rule of this section making the provisions of the Act applicable to a lender or money-lender's assignee exactly in the same way as they applied to the lender or money-lender himself,

as seen above, is, however, subject to one limitation set out in the opening words of the section, namely, "subject as hereinafter provided". The import of this limitation is that in relation to the case of a loan advanced *after* the commencement of the Act, the proviso of sub-sec. (1) will prevail . The proviso says that the assignee of the debt of a loan advanced *after* the commencement of the Act, who is not served with a notice under sec. 28(1), is not affected by the sweeping provision of sub-sec. (1) of this section, so that an agreement with or a security taken by a lender or money-lender in respect of such a loan will be valid in favour of the sasignee (or any other holder) who takes the assignment in good faith for valuable consideration and without any notice ot any defect due to the operation of the Act. This principle will hold good, *notwithstanding* any other provision in this Act. The reservation made in favour of a *bona fide* assignee for value without notice enures for the benefit of any person who *derives* his title from the assignee. Clause (b) of the proviso practically illustrates the effect of the validating provision of clause (a) of the Proviso. Clause (a) having declared valid the agreement or security in relation to a loan, the natural consequence that follows is that if any payment is made or if any money or property is transferred on the basis of such validity, the same will hold good. The *bona fide* transferees and holders for value being exempted from the rigours of the present statute, it may happen that the borrower will have to pay the full amount of his liability to such assignee or holder without being able to avail himself of the palliative provisions hereof. So a provision for indemnity has been provided in favour of the borrower or his successor-in-interest or his surety compensating him of the losses he suffers in consequence of his being made to pay, without enjoying the benefit of this Act, the full amount of his liability to the aforesaid assignee or holder.

Proviso (b).

The words "transfer of money" in Proviso (b) have been advisedly used to cover the case of *Transfer* of specific coins. When the specific coins have been thrown in common currency or in the ordinary course of circulation (*vide Bhupati Mohan* v. *Phaneendra Chandra Chakravarti*, 63 Cal. 578=62 C.L.J. 359=160 I.C. 219), *transfer* of money virtually means the same thing as *payment* of money. In order to give protection to a payment or to a transfer of money or property, under Proviso (b), it is necessary that such payment or transfer should be made *bona fide*, but it is immaterial whether the person making the payment or the transfer is acting *personally* on his own behalf or acting in a *fiduciary* capacity on behalf of actual beneficiary or as an agent of some other person ; the word "otherwise" is wide enough to cover the case of an agent also.

The person making the payment or transferring money or property, should be animated by the belief that the agreement with or security taken by the money-lender was a valid one. If this *belief* be wanting, it cannot be said that he made the *payment* or the *transfer,* in good faith. As to when or not an assignee will be considered to be in good faith, see *Mohar Ali* v. *Abdul Karim,* 107 I.C. 742. The words "such defect" in Proviso (b) mean 'defect due to the operation of this Act' and not any defect of any other description. Read sec. 17, Proviso (i) of the English Money-lenders Act, 1927.

The proviso will not however protect the lender or money-lender from a claim for damages put forward by the borrower or any other person who suffers a loss in consequence of the saving provisions contained in clauses (a) and (b) of the proviso. The benefit of the proviso also cannot be claimed by an assignee for value without notice if such assignee is himself a money-lender, that is, himself carries on the business of money-lending in Bengal [see sec. 2(13), *ante*]. The reason for making a distinction between a *bona fide* third party assignee and a money-lender assignee is obvious. The object of the Act is to regulate the conduct of money-lenders and to curb their greedy propensities and therefore the concession which can reasonably be made in favour of a *bona fide* third party assignee is not fit to be extended to a money-lender assignee, as otherwise the money-lenders will get a loophole to come in posing as innocent assignees and carry on their nefarious trade in that way. Notice that the above restriction obtains only against a *money*-lender assignee and not against a *kind*-lender assignee. The *kind*-lender has been regarded here with greater favour as he is considered to be more innocent of the two.

Sub-sec. (2) of the section reiterates the provisions of sub-sec. (1) in relation to loans advanced before the commencement of the Act, with the result that the Act is to be taken as applicable now, or to have been applicable before, or to be applicable hereafter, to all pre-Act loans, the interests in respect thereof, the benefits of any contract in relation to them or the securities taken in respect thereof; and this will be the position although the debt itself or the benefit of the contract in relation thereto or the security taken in respect hereof has been transferred to an assignee and this will be position although the assignee might be a person who stands outside the scope of the Act, e.g. a Scheduled Bank or a notified Bank. Although the assignment is in favour of a Scheduled Bank still the loan-transaction will be hit by this Act. Read L. A. proceedings dated 14-6-1939. As under sub-sec. (1), so under this

sub-section, a lender or money-lender in relation to a pre-Act loan will also include his assignee, subject to this condition that there is no contrary indication in the context of any particular provision of the Act negativing such inclusion. Read in this connection the notes at p. 14, *ante*. The phraseology of sub-section (2) is worthy of a passing notice. In speaking of the applicability of this Act to the pre-Act loans, the subsection makes use of three forms of expressions, *viz.*, "shall apply", "shall be deemed always to have applied" and "shall continue to apply". The predicate denoting operation has been expressed in different tenses or points of time just to emphasise the retrospective application of the provisions of this Act. It may be mentioned that when the Legislature wanted to make the definition of the term "attestation" contained in sec. 3 of the T. P. Act retrospective by the Amending Act X of 1927, they made use of the same expression, namely "shall always be deemed to have etc." Similar instances may be found in other statutes also.

Contrast between sub-sec. (1) and sub-sec. (2).

It would be worth one's while to contrast the scope of subsection (1) with that of sub-sec. (2). Sub-sec. (1) of the section contemplates the case of a loan advanced after the commencement of the Act, and sub-sec. (2) contemplates the case of a loan advanced before such commencement. It has been noticed that in sub-sec. (1) there is a *proviso* limiting its operation, but there is no such limitation in sub-sec. (2). Sub-sec. (1) applies subject to that limitation because of the opening words, "Subject as hereinafter provided". There is no such restriction in respect of assignments of pre-Act loans contemplated in sub-sec. (2).

Sub-sec. (3) says that an agreement, security or any other transaction which is otherwise invalid because of the other laws, will not be validated by reason of this section. For example, sec. 6 (b) of the Transfer of Property Act invalidates a transfer in so far as it is opposed to the nature of the interest created thereby or a transfer effected for an unlawful object or consideration within the meaning of sec. 23 of the Contract Act, or a transfer to a person legally disqualified to be a transferee. The effect of the present sec. 29 will not be to validate an assignment in all such cases. Assignments in fraud of creditors are prohibited by sec. 53 of the Transfer of Property Act or by the bankruptcy laws and this section will not have the effect of over-riding all these other laws. A transfer to a minor or for an immoral purpose or against policy are all prohibited and cannot be validated by this section. A transfer of an actionable claim to officers connected with

Courts of Justice, which has been prohibited by sec. 136 of the Transfer of Property Act, will not likewise be rendered valid simply because of the fact that this section has permitted an assignment of debts in general terms.

Benefit of agreement in respect of loans : A loan transaction may not always be a simple contract for repayment of the borrowed amount with interest but may include various other agreements between the parties giving rise to a variety of rights and obligations as between the lender and the borrower. In a case before the House of Lords [*Kreglinger* v. *New Patagonia Meat & Cold Storage, Co.,* (1914) A.C. 25=83 L.J. Ch. 78], a meat preserving company borrowed some money on mortgage from a firm of wool-brokers and a stipulation was entered into between them reserving a right of pre-emption in favour of the lender in respect of the sheep-skins sold by the borrower-company ; such a collateral benefit arising out of the loan transaction was held to be valid and enforceable in law. The validity of a similar collateral benefit arising out of a loan transaction was recognised also in *Re Cuban Land Co.,* (1921) 2 Ch. 147 ; read author's *Transfer of Property Act,* p. 402. Under the law of this country the benefit of all contracts and agreements are assignable ; see *Jaffer Meher Ali* v. *Budge Budge Jute Mills Co.,* 33 Cal. 702—on appeal 34 Cal. 289 ; *Hunsraj Morarji* v. *Nathoo Gangaram,* 9 Bom. L.R. 838 ; *Sakalaguna Nayudu* v. *Chinna Munuswami,* 55 I.A. 243=51 Mad. 533=48 C.L.J. 125=32 C.W.N. 850=A.I.R. 1928 P.C. 174=109 I.C. 765, P.C. consult also author's *Transfer of Property Act,* p. 28 and the following cases cited there : *Abu Mahomed* v. *S. C. Chunder,* 36 Cal. 345=13 C.W.N. 384 ; *Jewan Ram* v. *Ratan Chand,* 26 C.W.N. 285 ; *Mati Lal* v. *Radhey Lal,* A.I.R. 1933 All. 642. The present section 29 has simply recognised this general assignability of the benefit of an agreement in respect of a loan and has made provisions accordingly.

Assignment of Security : The debt arising out a loan may be separated from the security given for it [See *Imperial Bank* v. *Bengal National Bank,* 58 I.A. 323=54 C.L.J. 117=35 C.W.N. 1034=A.I.R. 1931 P.C. 245=134 I.C. 651, P.C.—reversing the decision of Rankin, C.J. and C. C. Ghose, J. in 58 Cal. 136= 53 C.L.J. 269=A.I.R. 1931 Cal. 223=131 I.C. 689]. In this case Lord Atkin has observed [See 54 C.L.J. 117 at p. 122] :—"The debts may be secured either on immoveable property or on merchandise : they may be wholly secured or partly secured : the security may have been given when the debt was created or later ; but in any case the debts exist as moveable property : and do not, if secured, become identified with the security or transformed into

land in one case or merchandise in the other. *The separation between debt and security is well established.*" This being the position, the security may be assigned along with or apart from the debt and this section speaking of assignment of the security simply recognises this principle. Security may be given for the amount of the loan itself or separately for the interest on the principal amount only. Under sec. 8 of the T. P. Act, securities for a debt are its accessories and as such pass along with the debt to the assignee thereof.

Assignment of Interest : As a general rule, interest is an accessory to the principal amount of a debt and is not separately recoverable [*Dhondiram* v. *Taba,* 27 Bom. 330 (333) ; *Hollis* v. *Palmer,* (1836) 2 Bing. (N.C.) 713] or assignable except as a part of the debt itself. But the parties may agree that the interest will form a separate and independent liability [See *Mcdappa Hedge* v. *Ram Krishna,* 35 Bom. 327=12 I.C. 42, P.C., *Kashi Pershad* v. *Jamuna,* 31 Cal. 922] and in such a case there will be a separate cause of action in respect of the interest as soon as it falls due [*Yeswant* v. *Vital,* 21 Bom. 267 ; *Kishan Narain* v. *Pala Mal,* 38 C.L.J. 126=27 C.W.N. 802, P.C.] and a prior suit for interest alone on the basis of such independent obligation will not subject a subsequent suit for the principal amount to the perils of O. II, r. 2 of the C. P. Code, *Ibid.* In absence of a special covenant to pay interest separately and as distinct from the principal money, the interest has no separate existence apart from the loan and cannot be separately recovered without being affected by the prohibition of O. II, r. 2 of the C. P. Code, *Satrucherla* v. *Maharaja of Jeypore,* 46 I.A. 151=42 Mad. 813=23 C.W.N. 1033=30 C.L.J. 209, P.C. Although interest is accessory to the debt, arrears of interest are not, see sec. 8 of the *Transfer of Property Act ;* therefore, there is nothing to stand in the way of assignment of such arrears. This section speaks of assignment of the benefit of contract or of assignment of security but does not say anything about assignment of interest, although sec. 28(1)(ii) refers to assignment of interest in specific terms. This is obviously for the reason that the Act does not recognise interest as a separate entity apart from the principal money. When it speaks of assignment of the debt, it takes the debt on account of the interest as part and parcel of the entire debt and places assignment of interest on the footing of an assignment of a part of the entire debt and for this reason no necessity for a separate mention has been felt, especially in view of the fact that in sec. 28 (1)(ii) specific mention has been made of assignment of interest.

CHAPTER VI.

Interest and other Charges.

Limitations as to amount and rate of interest recoverable.

30. Notwithstanding anything contained in any law for the time being in force, or in any agreement,

(1) no borrower shall be liable to pay after the commencement of this Act—

(*a*) any sum in respect of principal and interest which together with any amount already paid or included in any decree in respect of a loan exceeds twice the principal of the original loan;

(*b*) on account of interest outstanding on the date up to which such liability is computed, a sum greater than the principal outstanding on such date;

(*c*) interest at a rate *per annum* exceeding in the case of—

(*i*) unsecured loans, ten *per centum* simple,

(*ii*) secured loans, eight *per centum* simple,

whether such loan was advanced or such amount was paid or such decree was passed or such interest accrued before or after the commencement of this Act;

(2) no borrower shall after the commencement of this Act, be deemed to have been liable to pay before the date of such commencement in respect of interest paid before such date or included in a decree passed before such date, interest at rates *per annum* exceeeding those specified in sub-clause (*c*) of clause (1).

(3) a lender shall be entitled to institute a suit at any time after the commencement of this Act in respect of a transaction to which either or both of the preceding clauses applies or apply.

Limitations as to amount or rate of interest : The section puts a limit on the amount of interest that may be recoverable on account of interest in respect of any loan. It supersedes all law regarding the matter as is evident from the opening words of the section, namely "Notwithstanding anything contained in any law for the time being in force or in any agreement." An agreement between the parties for a different rate of interest from what has been provided for in this section will not be enforceable after this Act comes into force. The law here exercises a sort of parental care treating the prospective borrowers as so many babies incapable of shifting for themselves and protecting themselves against capitalistic aggression, and gives a go-by to the principles of contractual freedom recognised in *Jahander Bux* v. *Ram Lal,* 14 C.W.N. 470, by reason of which it is open to every adult person to enter into any engagement he likes, no matter whether he thereby ruins himself or makes a fool of himself. When the interest claimed exceeds the statutory limit, the Court should not decree the same even if the suit is not defended, [Comp. *Parkfield Trust* v. *Dent,* 101 L.J.K.B. 6=(1931) 2 K.B. 579; *Carrington* v. *Smith,* 75 L.J.K.B. 49=(1906) 1 K.B. 79; *Reading Trust ltd.* v. *Spero,* 99 L.J.K.B. 186=(1930) 1 K. B. 492] or judgment is confessed, *Mills Conduit Investment* v. *Denholm,* (1932) 1 K.B. 233.

The limitations as to amount and rate of interest which have been provided for herein are as follows :—

(*a*) The maximum amount which a money-lender can recover on account of principal and interest of a loan is twice the amount of the principal of the original. This maximum amount will include the amount already paid or that included in a decree on account of the loan.

(*b*) if some money has been paid towards the principal of the loan, then the outstanding interest should not exceed the outstanding principal.

(*c*) Interest on an unsecured loan should not exceed the rate of 10 p.c. *per annum* ,and that on the secured loans should not exceed the rate of 8 p.c. *per annum ;* such interest should always be *simple* and not *compound.*

The rates specified in the aforesaid three clauses should not be exceeded on any account whether the loan was incurred or any payment made on account of it or any decree passed for it, *before or after the commencement of the Act.* The rate of interest prescribed in the various clauses of this section applies with retrospective operation to all loans whenever advanced. It may be of some historical interest to mention here that so far back as 1793,

the benign East India Co. tried to curb the usurious spirits of the money-lenders of this country by promulgating Regulation XV of 1793 which contained provisions very much similar to those of this chapter, and was evidently founded on the Mitakshara law (*vide* sections, vi, vii, and xii of this Regulation). The Interest Act of 1839 (xxxii of 1839) also held the usurious spirits of the people in considerable check. In 1855 the Usury Laws Repeal Act (xxviii of 1855), following an English statute (17 of 18 Vict. c. 90) was passed by which all the early laws for regulating usury were swept away.

(a) **The Rule of Damdupat :** This sub-section practically lays down what has been known as the rule of Damdupat under old Hindu Law. Manu ordained with respect to this matter as follows : "In money transactions interest paid at one time (that is, otherwise than by instalments) shall never exceed the double of the principal" [Manu, viii, 151]. For Vijnaneswara's commentary on Manu, see Mitakshara vi, 1, 20 and II, 39, 50. It may incidentally be pointed out here that Vijnaneswara, though he has practically written a running commentary on the Institutes of Yajnyavalkya, has, in respect of this subject, preferred to follow Manu rather than Yajnyavalkya, who holds more favourable views for the creditor. The Rule of *damdupat* which is founded on the above texts got the recognition of our Courts from the earliest days of British rule, see *Dhondu* v. *Narayan,* (1863) 1 Bom. H.C.R. 47 and the other cases at pp. 462-463 of Sarkar's Hindu Law and at pp. 616-21 of Mulla's Hindu Law, 8th Edition. This rule has been held in certain cases [*Het Narain* v. *Ram Deni,* 9 Cal. 871 ; *Nobin Chunder* v. *Romesh Chunder,* 14 Cal. 781 ; *Ram Kanaye* v. *Cally,* 21 Cal. 840] to apply in the Presidency town of Calcutta, but not in the mafussil of Bengal [Cf. A.I.R. 1926 Pat. 94], because of the abolition of Beng. Reg. XV of 1793 [which made Damdupat applicable, though not as a rule of Hindu Law], read *Govind* v. *Malkarjunappa,* A.I.R. 1928 Nag. 133=107 I.C. 205. The rule of Damdupat was held to be inapplicable in cases which are subject to the provisions of the T. P. Act, [see *Dhonset* v. *Ravji,* 22 Bom. 86 ; *Madhwa* v. *Venkata Manjulu,* 26 Mad. 662 ; also *Re Hari Lall Mullick,* 33 Cal. 1269 (point raised but not decided)] ; but in certain other cases the rule was applied [*Jeewanbai* v. *Manordas,* 35 Bom. 199 (203)=8 I.C. 649 ; *Kunja Lal* v. *Narsamba Devi,* 42 Cal. 826=20 C.W.N. 110] ; the correctness of these decisions are, however, open to doubt, *vide* author's *Transfer of Property Act,* pp. 16-17. This old rule of Hindu Law has been revived in this sub-section in relation to cases which fall within its purview. Under this sub-section, the total amount a money-lender can realise on account of principal and interest of a loan advanced by him

will be *twice* the amount of the principal of the original loan. "Principal" under sec. 2(16) means the amount actually advanced to a borrower, and not any inflated sum which might have been mentioned in the deed relating to the loan. So, where in a case interest is added to the principal amount and a fresh document is executed for the aggregate amount so arrived at, the money-lender possesses no special advantage from this new engagement. In computing this *double* amount previous payments or amounts included in a decree in respect of the loan, should be taken into account. Although the provision of this clause applies after the commencement of the Act, still it may be availed of in respect of a loan advanced before such commencement.

Compare the provision of this section with sec. 6 of the Bengal Money-Lenders Act, 1933, and section 9 of the Central Provinces Money-Lenders Act, (XIII of 1934 and amended by Act XIX of 1937). The C. P. Act prohibits the making of a decree for interest in excess of the amount of the principal and therefore under that Act the past realisations go out of account, see *Ramchandra* v. *Madho Rao,* 1938 N.L.J. 364. The Bengal Act talks of "liability" and does not fix the limit of decreeable interest; therefore, under the present Act the past realisations of interest cannot be left out of account. The C. P. view follows Ghose, J.'s opinion in *Ram Chander Marwari* v. *Rani Keshobati,* 1 C.L.J. 182 and this Act follows the opinion of Maclean, C.J. in the same case.

As to the application of the old rule of "Damdupat", the following cases may be consulted with profit, *Debi Prasad* v. *Kusum Kumari,* A.I.R. 1930 Pat. 442; *Kisan Rao* v. *Mangni Ram,* A.I.R. 1929 Nag. 355=121 I.C. 45; *Sripat Singh* v. *Naresh Chandra Bose,* A.I.R. 1926 Pat. 94 [Damdupat not applicable to Muffasil]; *Khimji* v. *Chunilal,* 21 Bom. L.R. 419=51 I.C. 353 [the rule of Damdupat does not prevent capitalisation of interest]; *Mahamaya Dassi* v. *Abdur Rahim,* I.L.R. (1937) 1 Cal. 450=A.I.R. 1937 Cal. 752. With respect to this rule it was said that it applied as a matter of contract between Hindus and had nothing to do with the decree of Court after the matter had passed out of the realm or domain of contract, *Nanda Lal Roy* v. *Dhirendra Nath,* 40 Cal. 710=21 I.C. 974. As to the question of the applicability of the rule of damdupat as between Hindus and non-Hindus, see *Ibid;* also *Abdul Gani* v. *Shaik Nizam,* A.I.R. 1927 Nag. 249=102 I.C. 41; *Narayan* v. *Sayeed Hafiz,* A.I.R. 1925 Nag. 21=87 I.C. 264. Islamic jurisprudence does not practically recognise any usury, except by the device of *Bye-bul-wafa* (an out-and-out sale of property with a condition of repurchase at a higher price just to cover interest or profit on outlay), and, therefore, we do not find anything

similar to this rule in that system. The present Act applying to the Muslims as well, the rule of "damdupat" has, in a way, been forced upon them also.

(b) **Outstanding interest not to exceed outstanding Principal :** In cases in which a portion of the principal money has been paid, the outstanding interest should not be allowed to exceed the amount of the unrealised balance of the principal. This sub-section is virtually a necessary corrolary of clause (a). If the law were not so, prompt payment of a portion of the principal amount instead of being an advantage to the borrower would in many cases render the salutary rule of clause (a) illusory in relation to him.

(c) **Rate of interest :** The rate of interest fixed by this clause is 10 p.c., p.a. *simple* interest on the unsecured loan and 8 p.c., p.a. *simple* interest on the secured loans. A borrower is not liable to pay interest at a rate higher than what has been fixed by this sub-section. The word "shall" makes the section mandatory and imperative. The effect of this section is also to abolish payment of **compound interest** in respect of all debts, whether secured or unsecured. As to the difference between interest *simple* and *compound,* consult *Seth Ajodhya Prasad* v. *Shiv Prasad,* A.I.R. 1927 Nag. 18=97 I.C. 1019 ; *Krishnalal* v. *Bapu,* A.I.R. 1926 Nag. 363=94 I.C. 971. Even before this enactment compound interest could not be charged if not agreed to by the parties, *Jewan Lal* v. *Nilmani Choudhuri,* 55 I.A. 107=47 C.L.J. 302=32 C.W.N. 565 (P.C.) and the burden of proving agreement to pay compound interest was always on the creditor, *Radha Kishan* v. *Hira Lal,* 45 C.L.J. 318=31 C.W.N. 566=100 I.C. 668 (P.C.). One great effect of the abolition of compound interest will be to discourage the lenders from allowing interests to accumulate. The term "secured debt" has not been defined in this Act. It means a debt for the payment of which the borrower has made a mortgage or hypothecation of his property or created a charge or a lien in respect of the same on an understanding that the lender will, in default of payment by the borrower, be entitled to realise his dues from the property in question. A debt secured by the bailment or pledge of goods under sec. 172 of the Indian Contract Act is a secured loan as understood herein. Section 2(13) in express terms makes "money-lender" include a "pawnee" as defined in section 172 of the Indian Contract Act ; read the notes at p. 32, *ante*. A *secured* loan will not be regarded as an unsecured loan simply because the security is grossly inadequate.

What is a secured loan ?

The rate of interest fixed by this clause cannot be evaded by

devices of **renewals** of debts. For instances, a lender makes a fresh advance to the borrower and out of the advance he sets off an old debt with excessive interest and pays to the borrower only the balance which must necessarily be a smaller sum than that of the renewed loan. Such a device was actually resorted to in an English case [*Halsey* v. *Wolfe,* (1915) 2 Ch. 330, 334] ; but this will not be possible under the present Act. Consult also *Lyle* v. *Chappell,* 101 L.J.K.B. 185=(1932) 1 K.B. 691. Here, a question arises whether the rule as to renewed debts apply to a case where a third party takes over the liability of a borrower. The ordinary principle is that in the case of such an arrangement, the old debt is extinguished and is replaced by a new one, *Parianna Goundan* v. *Sellappa Goundan,* I.L.R. 1939 Mad. 218=A.I.R. 1939 Mad. 186. Such a case will not be within the operation of the Act as no *advance* of money within the meaning of sec. 2(12) of the Act was made in this case. The stranger taking over the liability of the borrower cannot also be regarded as his successor-in-interest within the meaning of section 2(2) of the Act.

Sub-sec. (2) : **Pre-Act interest also not to exceed the statutory rate :** This sub-section retrospectively affects even the Pre-Act interest and gives rise to a sort of legal fiction by reason of which a borrower *is to be deemed* to have been liable to pay interest even before the date of the present enactment only at the statutory rates fixed by this section. The meaning of the phraseology "shall be deemed" is that although in point of reality the facts were otherwise, still the Court will proceed on the hypothesis that the borrower was liable to pay interest only at the rates fixed by this section whatever the stipulated rate of interest might have been. The effect of this legal fiction is that all past realisations on account of interest in excess of the statutory rates prescribed herein will be considered to have been unauthorised and in excess of legal rights, and, therefore, illegal. By virtue of the powers conferred on the Court by sec. 36, *post,* the Court can re-open the transaction and grant relief to the borrower in respect of all such illegal excess realisations to the extent and in the manner specified in the said section 36. *Vide* notes under sec. 36, *post.*

Clause (3) : **Right of immediately suing for recovery of debts :** Under this sub-section as soon as this Act begins to operate a money-lender becomes forthwith entitled to institute a suit for the recovery of his dues in respect of a loan-transaction to which either or both of the first two sub-sections of this section applies or apply, although under the terms of the contract between the parties the debt in question has not become due. The money-lender might have invested his money in expectation of a good

return but as the effect of the present interest-cutting provision may be to falsify his expectations, the law here gives him the option of withdrawing his money from an investment which ceases to be profitable to him because of the new law of usury. So this enabling provision has been made here, authorising a money-lender to withdraw his money from an unprofitable investment and re-invest the same in some more profitable concern. Under section 67 of the *Transfer of Property Act,* a mortgagee cannot enforce his security before the due date, *Williams* v. *Morgan,* (1906) 1 Ch. 804; *Kannu Mal* v. *Natesa,* 14 Mad. 477; consult also author's *Transfer of Property Act* at pp. 386 & 457. Accordng to the decision of the Judicial Committee in *Nil Kant Balwant* v. *Vidya Narasingh Bharati,* 57 I.A. 194=54 Bom. 495=52 C.L.J. 539=34 C.W.N. 854=A.I.R. 1930 P.C. 188=126 I.C. 417, P.C., if no time be fixed for the payment of the mortgage debt, the money does not become due until a demand is made for repayment and the mortgagor fails to comply with the same. There is a provision for due date also in sec. 79 of the Negotiable Instruments Act, 1881. The effect of this sub-section (3) is to liberate the money-lender from all these restrictive provisions of the law and to emancipate him from the obligations of his agreement to stay his hand, till the due date, and this sub-section prevails *notwithstanding anything contained in any law for the time being in force or in any agreement.*

This sub-section has been very unhappily worded, inasmuch as it lends itself to the absurd construction that once this new law has come into force, the lender can institute his suit for recovery of his money *at any time,* unhampered by the period of limitation, because this sub-section prevails over other laws by reason of the opening reservation which governs the whole section.

The Section fixes only the maximum limit of interest : The section only limits the maximum rate of interest and does not fix any minimum. So the parties to a loan are absolutely free to fix any lower rate of interest they like. But there must always be some provision for interest in the loan transaction otherwise it would altogether go out of the category of loan and stand outside this Act, see sec. 2(12) and read the notes at p. 27, *ante.*

Interests specified or unspecified in Negotiable instruments.

Under section 79 of the Negotiable Instruments Act, 1881 (Act XXVI of 1881), if interest is expressly made payable at a specified rate on a promissory note or a bill of exchange, such interest shall be calculated at the rate specified on the amount of the principal money due

thereon from the date of the instrument until tender or realisation of such amount or until such date after the institution of a suit to recover such amount as the Court directs, Comp. also *Mackintosh* v. *Wingrove,* 4 Cal. 137; *Mackintosh* v. *Hunt,* 2 Cal. 202; *Govindjee* v. *C. Ko Po Yee,* 11 I.C. 891 (Bur.); *Ghazaffar Hussain* v. *Mahabir Pershad,* 17 I.C. 309 (Oudh). Under sec. 2(12)(e), a **Promissory Note** has been brought within the scope of this Act, but a bill of exchange has not been so brought. Therefore, a **bill of exchange** is not affected by the restrictive provisions of this section, although the same is subject to the provisions of sec. 3 of the Usurious Loans Act, (X of 1918), *Sheobans Rai* v. *Shah Madho Lal,* 53 All. 776=A.I.R. 1931 All. 662=136 I.C. 78. In relation to "promissory notes" however, the provisions of this Act will apply, notwithstanding the provisions of sec. 79 of the Negotiable Instruments Act.

Sec. 80 of the Negotiable Instruments Act, 1881, provides that if no interest is specified in a promissory note or a bill of exchange, interest will be calculated on them at the fixed rate of 6 *per centum per annum* from the due date until the date of tender or realisation. Cf. *Ghansiam* v. *Ram Narain,* 34 I.A. 6= 11 C.W.N. 105=5 C.L.J. 7, P.C.; *Premlal Sein* v. *Radha Ballav,* 34 C.W.N. 779. This statutory rate is not in any way affected by the provisions of this Act for two reasons: (1) because it is lower than the rate fixed by this section, (2) there being no stipulation for interest, these transactions altogether stand outside the definition of loan contained in sec. 2(12), *ante.* In relation to Bills of Exchange, it may further be mentioned that they are also saved by clause (e) of sec. 2(12) which says that all forms of negotiable instruments other than a promissory note altogether stand outside the operation of this Act.

Hundis and other negotiable instruments in oriental language though negotiable by custom [e.g. *Dhani Jog Hundis* (see *Ghureram* v. *Mahomed Yusaf,* A.I.R. 1928 All. 549=111 I.C. 686) and *Shah Jog Hundis* (see *Champakal* v. *Keshrichand,* 50 Bom. 765=98 I.C. 555; *Madhoram* v. *Nundumal,* 1 Lah. 429=58 I.C. 982)] do not in terms fall within the definition of "Negotiable Instruments" as given in sec. 13 of the Negotiable Instruments Act, 1881 and are excepted from the operation of that Act by sec. 1 thereof [See *Harnarain* v. *Bihari Lal,* 13 Lah. 800=A.I.R. 1932 Lah. 582=142 I.C. 729]. Sec. 2(12)(e) of this Act exempts from its operation only those negotiable instruments (other than a Promissory Note) which fall within the purview of the definition contained in sec. 13 of the Negotiable Instruments Act; consequently, *hundis* and similar

other documents in oriental language, though negotiable by custom or local usage, will not go out of the scope of this Act and therefore the low-interest rule of this Act may apply to them. But condition of payment of interest being the *sine qua non* of the operation of this Act [See sec. 2(12)] a Hundi without any specification of interest in it will not come within the sec. 2(12) of the Act. The mere fact that there is a prevailing custom in the country to pay interest on *hundis* will not bring them within the operation of the Act for the simple reason that a custom is not equivalent to a *condition* or stipulation for payment of interest. The customary interest can no doubt be enforced notwithstanding sec. 80 of the Negotiable Instruments Act, [*Maung Po* v. *Vellayappa,* 62 I.C. 315], but that will not make this Act operate.

Promissory Notes without specification of interest : Promissory notes or pro-notes, although specifically contemplated by the definition of the term, "Negotiable Instrument" contained in sec. 13 of the Negotiable Instruments Act, 1881, have been made amenable to the provisions of this Act by sec. 2(12)(e) hereof, but this subjection of the promissory notes to this Act is possible only if a rate of interest is specified in the pro-note itself, because in the absence of a provision for payment of interest the pro-note cannot amount to a "loan" within the meaning of sec. 2(12). A promissory note containing no provision for payment of interest carries the statutory interest of 6 p.c. p.a. under sec. 80 of the Negotiable Instruments Act. The mere fact that a pro-note without specification of interest is capable of carrying statutory interest will not make it amount to a *loan* within the meaning of sec. 2(12) for the simple reason that a statutory obligation is quite a different thing from a *condition* for payment of interest imposed by the parties themselves.

Contemporaneous agreement—oral or written—as to interest : A condition or stipulation for payment of interest is essential to give a transaction the character of a loan within the meaning of this Act [See sec. 2(12)] ; so, the question naturally arises that where a document for a loan transaction is silent as to interest, whether the character of the transaction as a loan within the purview of the Act can be saved by means of a contemporaneous or subsequent agreement to pay interest for the borrowed amount. If such agreement is oral, evidence to establish it will be inadmissible by reason of section 92 of the Indian Evidence Act. This seems to have been held in *Lachmichand* v. *Hemendra Prosad,* 18 C.W.N. 1260, which was followed in *Mati Biswas* v. *Haripada Pal,* 26 C.W.N. clxxi (171). See

also *Banwarilal* v. *Jagannath Prosad,* 1 Pat. L.J. 71=35 I.C. 431; *Fathuma* v. *Hanumantha,* 17 M.L.J. 29; *Yado* v. *Behari Lal,* 53 I.C. 242 (Nag.); *Ramgopal* v. *Sitaram,* 20 I.C. 319 (rate of interest was entered in the accounts of both the parties). In some cases it has been pointed out that an oral agreement to pay interest is not inconsistent with the terms of a document which is silent as to interest and, therefore, may be proved by reason of the saving Proviso (2) of sec. 92, *Sowdamini* v. *Spalding,* 12 C.L.R. 163; *Umesh Chandra* v. *Mohini Mohan,* 9 C.L.R. 301. Cf. *Bhansing* v. *Gokul,* 53 I.C. 137; *Pentya* v. *Kesheorao,* 56 I.C. 249 (Nag.); Proviso (2) of sec. 29 of the Indian Evidence Act says that in considering whether or not it applies, the Court shall have regard to the degree of formality of the document. Having regard to the terms of sec. 2(12) of the Act, it must be an essential *formality* for a document of loan hereunder to recite a stipulation as to the rate of interest, and the said proviso (2) cannot possibly operate to make an oral agreement for interest admissible for saving the character of a loan *as such.* As to written agreement for interest in respect of a document of loan which is silent as to it, sec. 92 of the Evidence Act does not stand in the way of its admissibility, and the original document of the loan together with the subsequent or contemporaneous written agreement may be regarded as amounting to a *transaction which is in substance a loan* within the meaning of sec. 2(12) of the Act. This view will receive support from *Ghausiram* v. *Ram Narain,* 29 All. 33=11 C.W.N. 105, P.C.; *Rangappa* v. *Bismilla,* 32 I.C. 238 (Nag.) Although a written agreement, contemporaneous or subsequent, for interest can maintain the character of a loan for the purposes of this Act, still it will be ineffective to take a pro-note not specifying interest at the outset out of the operation of sec. 80 of he Negotiable Instruments Act. This legal consequence arises out of the amendment of the said sec. 80 by the Amending Act XXX of 1926. Cf. *Venkatachelapathi Nidhi* v. *Najappa,* A.I.R. 1933 Mad. 299=141 I.C. 809.

Prohibition of interest on decretal amount.

31. Notwithstanding anything contained in any law for the time being in force, no Court shall, in any decree passed in any suit to which this Act applies—

(*a*) if the loan to which the decree relates was advanced before the commencement of this Act, allow any interest on the decretal amount, or

(*b*) if the loan to which the decree relates was advanced after the commencement of this Act, allow any interest other than interest not exceeding six *per centum per annum* on the principal sum adjudged.

No interest on decretal amounts : Provision for award of interest on the decretal money has been made in sec. 34 of the Code of Civil Procedure and the effect of the present section is to make a new rule for interest on decretal money in the place of said sec. 34 of the C. P. Code. It is for this reason that this section opens with the declaration, "Notwithstanding anything contained in any law for the time being in force"— The effect of this sweeping declaration is that the provision of said sec. 34 of the C. P. Code will be controlled by the prohibition of this section. The award of interest in respect of decrees for the enforcement of a mortgage or charge is provided for in O. xxxiv, r. ii and the effect of the present section is to control even that provision if the loan in question is of such a character that the provisions of this section are attracted to it.

The Courts will give effect to the provisions of sec. 30 even *suo motu* [Comp. *Nanu Mia* v. *Manu Mia,* A.I.R. 1925 Cal. 392=82 I.C. 830], even if the matter is not pleaded in defence [*Ibid*], or even if the case is heard *ex parte,* [*Narendra Nath* v. *Paban Mandal,* 52 C.L.J. 73=A.I.R. 1930 Cal. 776], or even where the defendant confesses judgment [*S. P. R. M. Firm* v. *Maungo Po Kyn,* 1 Rang. 580=A.I.R. 1924 Rang. 114=77 I.C. 382 ; read also the notes at p. 126, *ante*.

With respect to the question of interest on decretal money the section makes a distinction between the loans which were advanced before the commencement of the Act and those advanced after such commencement. No interest can be allowed on the decretal money in respect of a pre-Act loan [Cl. (a)], but in respect of a *post*-Act loan, interest up to a limit of 6 p.c. p.a. can be allowed *on the principal sum adjudged* [Cl. (b)]. The words in italics have evidently been taken from sec. 34 of the Civil Procedure Code. The decretal amount referred to in clause (a) must necessarily include interest and therefore to allow interest on the decretal amount will mean allowing interest on interest which is contrary to the prohibition regarding compound interest which is the most outstanding feature of the present statute. Although no interest can be allowed on the decretal money in respect of a pre-Act loan, under Cl. (b) of the section interest can be allowed on the

principal sum adjudged (and not on the decretal money) in respect of a post-Act loan. The amount of decree includes interest and costs and as it is not the policy of this Act to allow compound interest, Clause (b) specificially provides for payment of interest only on the principal sum and not on the entire decretal money.

The word "principal" has been defined in section 2(16) as the amount which has been *actually* advanced to a borrower. As a portion of the principal money might have been repaid, specific provision has been made in clause (b) to limit the claim for interest only to the amount which is found or adjudged by the Court to be outsanding. The maximum rate of interest which can be allowed under clause (b) of the section is six *per centum per annum*. The words "decree relates" show that the question of interest contemplated by the section arises only after a decree has been made; it has got nothing to do with the question of interest *pendente lite,* or interest from the date of the suit to the date of the decree. For that provision has been made in sec. 34 of the C. P. Code, *vide* notes under the next heading.

Interest Pendente Lite : Under section 34 of the Code of Civil Procedure, the Court has a discretion (notice the word, "may" in said sec. 34) in the matter of awarding interest *on the principal sum adjudged,* "from the date of the suit to the date of the decree". [Cf. *Majumdar Hiralal* v. *Desai Narsilal,* 40 I.A. 68=17 C.L.J. 474=17 C.W.N. 573, P.C. The effect of the present section is not to restrict such discretion of the Court so long as it does not transgress the rule of *damdupat,* enacted herein (and the Court will have always power to award *pendente lite* interest *at such rate as the Court deems reasonable* [see sec. 34, C. P. Code], of course, within the limitations mentioned above. It may be remembered that the duration of pendency of suit is prolonged because of the Court's inability to decide it forthwith as soon as it it filed and as the Court's action or omission should not prejudice anybody, the Court has been given a wide discretion in the matter of *pendente lite* interest. So, the position is that the Court still retains is discretion under said sec. 34 of the C. P. Code, but it should now exercise its such discretion subject to the restrictive condition of this section, because a discretion cannot be said to be properly exercised if it transgresses some statutory provision. While awarding *pendente lite* interest, the Court will be bound to see that the total decretal sum including the past realisations does not exceed twice the principal of the original loan.

32. In the case of loans in kind, the money value of the commodity at the time when, and in the

Computation of interest on loans in kind.

locality where, the loan was advanced shall, for the purposes of this Act, be deemed to be the principal of the loan, and in determining the amount which may, subject to the provisions of this chapter, be decreed in respect of any loan repayable in kind, the Court shall take into consideration the market value of the commodity in the said locality at the date or dates of repayment.

Interest on loans in kind how to be calculated : For the definition of *interest* see sec. 2(8), and for *principal* read the notes at p. 35, *ante*. It has been seen there that sec. 2(16) defines the term 'principal' only in relation to money loans. This section defines the term "principal" in relation to kind-loans and says that in this latter case the *principal* will be the money value of the commodity advanced as loan with reference to the date and place of the loan. The commodity advanced may have different values at different times or at different places ; so in making calculations as to the value of a loan or as to the quantum of interest payable in respect thereof, it is always expedient to take the money value of the commodity advanced with reference to the date and place of the loan. Interest being the amount paid in excess over the amount of the original principal, this section requires calculation to be made with reference to the money value of both the time of the loan and the time of repayment. Notice that the section uses the expression "the amount which may be decreed" without saying whether *such amount* is that of the principal or of interest or of both. The word "amount" being used in a general way it will necessarily cover the cases of both *principal* and *interest.* So at time of making the decree, even the principal has to be assessed with reference to date of repayment. The words "subject to the provisions of this Chapter" imply that rates and amounts of interest should be computed in accordance with the provisions of this Chapter, and the limits as to the rates of interest fixed by section 30 should not be exceeded on any account.

The principle of computation laid down in the first part of the section will apply wherever the loan is granted in kind. The second part of the section is in its terms applicable only to the case where the loan in kind is also *repayable in kind*. If a loan in kind is repayable in money, the second part of the section will not apply but the limits of interest fixed by section 30 should not be overlooked even in such a case. The marginal note of the section is not sufficiently exhaustive or expressive of the meaning

of the section and therefore may be ignored in construing it, consult *Balraj Kunwar's case,* cited at p. 3, *ante.*

Valuation of commodity : The section makes the money value of the commodity given as a loan the determining factor for ascertainment of the *principal of the loan* in relation to loans in kind, but does not say anything as to what method should be followed for determining such money value. The reference to *time* and *locality* in the section indicates that money value of the commodity lent out will virtually be its market value, that is, the price it will fetch if sold out in an open market of the locality on the date of the loan. That the money value of the commodity will be its market value is apparent also from the fact that the sections enjoin upon the Court to take the *market-value* of the commodity on the date of repayment into consideration while making a decree in respect of loan in kind. In ascertaining the money value of the commodity, the Courts should not go by any valuation of it which the parties themselves might have stipulated for, because that would enable the money-lender to inflate the original amount of the loan so as to cover a rate of interest much higher than that sanctioned by the statute. When the Court has to make a decree in respect of a loan in kind, it has again to take into consideration the market value of the place of the loan with reference to the date of repayment. The Court should take such market value *into consideration,* but should not necessarily make a decree on its basis, because if the Court does so, it may in some cases exceed the statutory limits of interest fixed by sec. 30, and that would be wholly illegal. This is why the Court's power to take into consideration the market value of the commodity at the time of making a decree has been hedged in by the condition, "subject to the provisions of this Chapter". The market value of the loaned-out commodity should always be ascertained with reference to the place where the loan was advanced, as the goods in question may fetch different prices at different places and this divergence in valuation may differently affect the original amount of the loan or the rate of interest. It should be remembered that in decreeing a claim for goods, the Court, for obvious reasons, always draws up a decree in terms of money and not of goods. Cf. *Amiruddin Sh. Khalifa* v. *Radharani Bhowmic,* 41 C.W.N. 181.

Method of valuation.

33. Any agreement between a lender and a borrower or intending borrower for the payment

Prohibition of charges for expenses on loans.

to the lender of any sum on account of costs, charges or expenses incidental or relating to the negotiatons for, or the granting of, the loan or proposed loan, shall be illegal, and if any sum is paid to a lender by the borrower or intending borrower as, for or on account of any such costs. charges or expenses, that sum shall be recoverable as a debt due to the borrower or intending borrower, or in the event of the loan being completed, shall, if not so recovered, be set off against the amount actually lent and that amount shall be deemed to be reduced accordingly:

Provided that nothing in this section shall debar a lender from recovering the costs of investigating title, of stamp duty and registration of documents and other necessary and incidental expenses in cases where the agreement includes a stipulation that property is to be given as security or by way of mortgage, or the costs of stamp duty and registration of documents in the case of unsecured loans, if both parties have agreed to such expenditure and the reimbursement thereof, nor from recovering such costs, charges or expenses as are leviable under the provisions of *the Transfer of Property Act, 1882*, or *any other law* for the time being in force.

Analogous Law : See section 5 of the Assam Money-Lenders Act, 1934 and section 12 of the English Money-lenders Act, 1927.

Exactions on account of expenses, costs etc. for loans illegal : The section prohibits an agreement to pay, or actual pay ments of, costs, charges, or expenses for or of negotiations for, or transactions in relation to, loans. If there be any agreement between a lender and a borrower or an intending borrower for payment of such costs and expenses, the same will be illegal and unenforceable. Such an agreement being declared illegal by this section, it will be "forbidden by law" within the meaning of section 23 of the Indian Contract Act and therefore the agreement will be altogether void and of no legal effect, see section 2(g) of the Ind. Contract Act. The object of the section, evidently is to discourage all attempts on the part of the lender to realise from the borrower extra amounts in addition to legal interest on some pretext or other. If as a matter of fact any amount is actually paid by the

borrower or the intending borrower, to the lender, as costs, charges or expenses of negotiation for the loan, then the borrower or the intending borrower will be entitled to obtain by suit a refund of the amount so paid by him. As to whether interest can be charged on this amount, *vide* under a separate heading, *post*.

It is worthy of mention that the section speaks of a "lender" only and not of an *intending* lender. The term "lender" means a person who advances a loan, see section 2 (9). But as the section contemplates the case of a non-completed loan as well, the term "lender" must necessarily include an *intending* lender also. This will be an instance of "repugnancy in the context" mentioned in the opening reservation of section 2 which will justify a construction out of the definition clause of the Act. Moreover, the two terms 'lender' and 'borrower' are correlative; therefore, when the Legislature has specifically mentioned the case of an *intending* borrower it must have intended the term "lender" to include the case of an *intending* lender also.

If the loan is not completed the costs and expenses of negotiation may be *recovered* by means of a regular suit; on the other hand, if the loan is completed, the borrower can ask for a set-off for his costs and expenses in defence in a suit upon the loan. For 'set-off' in a written statement, see O. VIII, r. 6 of the Code of Civil Procedure. The costs and expenses having been made *recoverable* by this section, they will be considered to be *legally* recoverable within the meaning of said o. viii, r. 6. A question of some complexity may here arise, because the claim for costs and expenses necessarily being anterior in date to the claim in regard to the loan a question of limitation may possibly arise when it is pleaded in defence as a set-off. It would however seem that such a claim arising out of the same transaction may be placed on the footing of an equitable set-off, and the question of limitation may be evaded in that way. In this connection consult the following cases: *Ramdhari Singh* v. *Permanund*, 19 C.W.N. 1183; *Narendra* v. *Ashutosh*, 35 C.W.N. 17; *Sheovharan* v. *Mohabir*, 32 Cal. 576; *Edward* v. *Ramdin*, 14 C.W.N. 170, 173. Ordinarily, a written statement containing a claim of set-off, requires to be stamped; see Art. 1, Sch. I of the Court-fees Act; also *Chennappa* v. *Raghunatha*, 15 Mad. 29; *Kamal Kumari* v. *Rangpur North Bengal Bank*, 25 C.W.N. 934; *Rezai Karim* v. *Mahomed Israil*, 43 C.W.N. 838; and it has been held that for certain purposes, the set-off has the same effect as a plaint in a cross-suit, *Guise* v. *Anantaram*, 10 C.W.N. 199. Cf. *Fakir Chandra* v. *Gisborne & Co.*, 8 C.W.N. 174; but from the language of this section, it would seem that the set-off in this

Set-off of the expenses for or costs of loans.

section has not been put on the footing of a cross-claim. The section simply says that the lender's claim will be deemed to be *reduced* by the amount of costs and expenses and this means that the set-off herein mentioned amounts to an equitable set-off which does not require any Court-fees, *Subramaniam* v. *Muthuswami,* 17 M.L.J. 481. Such a set-off is not a *positive* gain to the defendant, but simply *reduces* the plaintiff's claim, and therefore, does not strictly fall within the scope of "set-off" as used in Schedule I, Art. 1 of the Court-fees Act; therefore, it will not be affected by the observation of Nasim Ali J. in *Rezai Karim* v. *Mahomed Israil,* 43 C.W.N. 838, at p. 842.

Limitation and Court-Fees for suits for refund of costs and expenses of negotiation for loan : The section declares that these sums shall be *recoverable as a debt* to the borrower or the intending borrower. Therefore, an independent suit may be maintained for the recovery of them, and the cause of action will arise as soon as the illegal payment is made. The limitation for such a suit will be governed by Article 62 of the Indian Limitation Act, inasmuch as all cases of wrong payments are considered to fall within the scope of the expression, "moneys had and received for the plaintiff's use", *Lachmi Narain* v. *Danukdhari,* 17 I.C. 351 (Cal.); also *Ram Kumar Shaha* v. *Ram Gour Saha,* 37 Cal. 67= 10 C.L.J. 558=13 C.W.N. 1080=2 I.C. 559. Art. 62 of the Limitation Act being applicable to the case, the borrower cannot avail himself of the long period of six years prescribed by Art. 120 of the said Act.

The question of Court fees will not present any difficulty as such fees are to be paid on the *advalorem* basis just as in the case of an ordinary suit for the rceovery of a debt.

Interest on the amount of Refund : Interest can be allowed on the amount of costs and expenses contemplated in the section when a suit is instituted hereunder for their refund, on the strength of the provisions of the Interest Act (xxxii of 1839). The right to such refund not arising by virtue of any written instrument and the money not being payable at a certain time, within the meaning of the Interest Act, interest under that Act can be allowed only where a *written* demand has been made for the refund and a notice has been given in the demand to the effect that interest will be claimed. In the absence of a written demand and notice of a claim for interest, interest will not be allowed, *Venkata Reddiar* v. *Desika Chariar,* A.I.R. 1925 Mad. 1297=92 I.C. 354; see also *Jwala Prosad* v. *Hotilal,* 46 All. 625=A.I.R. 1924 All. 711=71 I.C. 1049. Cf. *Jagat Singh* v. *Jagat Singh,* A.I.R. 1933

Lah. 212=145 I.C. 157; *Narapatrai* v. *Devanchand,* A.I.R. 1930 Bom. 444; *Desh Raj* v. *Frays Motor Works,* A.I.R. 1923 Lah. 302=95 I.C. 64. Interest under the Interest Act can be allowed, in the discretion of the Court, at a rate not exceeding the current rate of interest. Read *Suryanarain* v. *Protapnarain,* 26 Cal. 955 [10 p.c. allowed]; *Khetra Mohan* v. *Nishi Kumar,* 22 C.W.N. 488 (6 p.c. allowed); In *Narain* v. *Abinash,* 37 C.L.J. 457=27 C.W.N. 299=69 I.C. 273, P.C., the Judicial Committee considered 12 p.c. to be the proper and reasonable rate of interest, having regard to the local conditions of this country.

Proviso : Costs of investigation of title and registration or of stamp duty and other necessary and incidental expenses : By virtue of the proviso, these costs are not affected by the prohibition of the substantive part of the section. These costs are always realisable if parties have agreed to give property as security or by way of mortgage. Costs of investigating title can possibly arise only in case of secured loans and not in the case of unsecured loans, in which case the lender can get only the costs of stamp duty and registration of documents if both the parties have agreed that such expenditure should be incurred and provision has been made for re-imbursement of such expenditure. In the case of secured loans other *necessary* and *incidental* expenses are payable. These expenses include such legal charges as pleaders' fees or so forth. The necessary and incidental out-of pocket expenses are not payable in the case of an unsecured loan. The costs and charges leviable under the provisions of the Transfer of Property Act or of any other law for the time being in force are also not hit by the prohibition contained in the first paragraph of the section. For costs and expenses leviable under the T. P. Act, see section 60 B of that Act. As to costs and expenses payable under any other law for the time being in force, see O. xxxiv, rr. 2 & 4 as amended by Act XXI of 1929. (T. P. A. Supplementary Act).

As to whether the costs of investigation of title or other incidental and necessary expenses or the costs of stamp duty and registration can be recovered with interests, *vide* notes under the last heading. If the parties have stipulated that such costs are to be paid with interest, then interest will be paid as a matter of course. Interest in such cases can be awarded also by way of damages for the breach of contract. Consult section 73, *illus.* (n) of the Indian Contract Act. Read also *Kamalanand* v. *Peeru Meera,* 20 Mad. 481; *Ghansiam Singh* v. *Doulat Singh,* 18 All. 240; *Jogeswar Bhagat* v. *Ghaneshām Das,* 5 C.W.N. 356; *Gudre Koer* v. *Bhubaneswari,* 19 Cal. 19; *Khetra Mohan* v. *Nishi Kumar,* 22 C.W.N. 488=45 I.C. 667, and the other cases cited at p. 25, *ante.*

CHAPTER VII.

Miscellaneous.

Power of Court to direct payment by instalments.

34. (1) Notwithstanding anything contained in any law for the time being in force, or in any agreement, the Court shall—

(*a*) in suits in respect of loans to which the provisions of Order XXXIV of the First Schedule to the Code of Civil Procedure, 1908, apply, on the application of the defendant and after hearing the plaintiff, notwithstanding the limit of six months provided therein, direct at the time of the passing of the preliminary decree under rule 2 or rule 4 of the said Order to the effect mentioned in sub-clause (*i*) of clause (*c*) of sub-rule (1) of the said rule 2,—

(*i*) that the payment of the amount found or declared due under sub-rule (1) of rule 2 or sub-rule (1) of rule 4 of the said Order, as the case may be, is to be made, subject to such conditions as the Court may impose in such number of annual instalments and on such dates as the Court thinks fit having regard to the circumstances of the plaintiff and the defendant and the amount of the decree; and

(*ii*) that in default of payment of any such instalment the plaintiff shall, after giving to the defendant such notice as may be prescribed, be entitled to apply for a final decree under sub-clause (*ii*) of clause (*c*) of sub-rule (1) of the said rule 2 or under sub-rule (1) of the said rule 4, as the case may be, and the date of

*such default shall be deemed to be the date fixed under sub-clause (*i*) of clause (*c*) of sub-rule (1) of the said rule 2 for payment of the whole amount found or declared due under or by the preliminary decree:

Provided that nothing in this clause shall affect the power of the Court to allow extension of time under sub-rule (2) of rule 2 or sub-rule (2) of rule 4 of the said Order:

Provided further that if the defendant, after receiving the notice referred to in sub-clause (*ii*) and before a final decree is passed, makes payment into Court of the amount due from him in respect of any such instalment, the payment of such instalment shall not be deemed to be in default and the Court shall not pass a final decree;

(*b*) in suits in respect of loans advanced before the commencement of this Act other than those referred to in clause (*a*)—

(*i*) on the application of a defendant and after hearing the plaintiff, order at the time of the passing of the decree, or

(*ii*) on the application of a judgment-debtor against whom a decree in such suit has been passed whether before or after the commencement of this Act and after notice to the decree-holder, order at any time after the decree has been passed,

that the amount of the decree shall, subject to such conditions as the Court may impose, be payable without interest in such number of annual instalments, on such dates and within such period not exceeding twenty years as the Court

thinks fit having regard to the circumstances of the plaintiff and the defendant or the decree-holder and the judgment-debtor and the amount of the decree, and that, if default is made in making payment of any instalment, that instalment and not the whole of the decretal amount shall be recoverable;

(*c*) during the pendency of any enquiry under sub-clause (*ii*) of clause (*b*) order, subject to such conditions as the Court may impose, the stay of execution of the decree.

(2) In default of payment of any instalment referred to in clause (*b*) of sub-section (1), the decree-holder shall, after giving to the judgment-debtor such notice as may be prescribed, be entitled to apply for execution of the decree in respect of such instalment together with interest thereon at the rate of not more than six *per centum per annum* from the date of such default:

Provided that nothing in this sub-section shall affect the power of the Court to allow, prior to an order for execution of the decree, an extension of time of not less than one year for the payment of any instalment, and that if such extension of time is allowed, the payment of such instalment shall not be deemed to be in default:

Provided further that if the judgment-debtor, after receiving the notice referred to in this sub-section and prior to an order for execution of the decree, makes payment into Court of the amount due from him in respect of any such instalment, the payment of such instalment shall not be deemed to be in default and the Court shall not order execution of the decree.

(3) Any order made under sub-clause (*ii*) of clause (*b*) of sub-section (1) shall be deemed to have

been passed under section 47 of the Code of Civil Procedure, 1908.

Actions by money-lenders : In this country there is no special provision of procedure corresponding to the provisions of O. III, r. 10 or O. XX, r. 10 of the Rules of the Supreme Court of England regarding this class of actions. Therefore, an action by a money-lender here will not be defective on any of the grounds on which such an action will be defective in England.

Power of Court to direct payment by instalments : The section confers power upon the Civil Court to direct that the amount of any loan, whether secured or unsecured, be paid by instalments. The section contemplates both secured and unsecured loans. Provision for the secured loans is made in clause (a) of sub-section (1) and that for the unsecured loans has been made in clause (b) of that sub-section. The Court's power to grant instalments is not affected by any provision of law contained in any other statute or by any agreement between the parties. This has been made clear by the opening words of the section, *viz.* "Notwithstanding anything contained in any law etc." The provisions of the section are obligatory. This has been clearly indicated by the word "shall". But the direction for payment by instalments can be given only *on the motion* of the judgment-debtor and not *suo motu* (*Vide infra*). If the Court finds no reason for rejecting the defendant's application for instalment, it will be bound to order payment by instalments. This is imperative. Contravention of this imperative provision is a serious irregularity vitiating the decree which may be rectified by an appellate Court. Such contravention however does not render the decree void *ab initio* or a nullity, so that if a decree is made for the entire claim without any direction for payment by instalments on the defendant's motion, no objection on the ground of the invalidity of the decree can thereafter be taken before the executing Court, and the F. B. case of *Gora Chand* v. *Profulla Kumar,* 53 Cal. 166=42 C.L.J. 1=29 C.W.N. 948, will be of no help in the matter.

Sub-sec. (1)—clause (a) : Secured Loans.

In the case of a **secured loan** the provisions of O. xxxiv, rr. 2 & 4 of the Code of Civil Procedure apply. Rule 2 of that Order relates to a 'foreclosure' suit and Rule 4 to a suit for sale. In both these rules provision has been made providing a period of grace for six months within which the judgment-debtor is to pay the decretal amount fixed by the preliminary decree and failing which the mortgaged property is foreclosed or put to sale. The effect of the present section is to alter this period

of grace, intended to facilitate payment of the decretal money. Under it the period of grace is considerably prolonged and the Court allows the judgment-debtor to pay the decretal money in instalments spread out over the prolonged period of grace, so to say, instead of making him to pay the entire amount in one lump within a fixed period of six months.

It is worthy of mention here that in the case of secured loans, for the purpose of granting instalments and of shaping the period of grace, the Act does not make any distinction between the loans contracted before the commencement of this Act and those contracted thereafter. Therefore, instalments may always be granted under this Act in respect of all secured loans which are subject to the provisions of O. XXXIV of the Civil Procedure Code; but in the case of unsecured loans, it will be seen from the provisions of sub-section (2) of this Act, that the policy of this Act is to make a distinction between the loans contracted before the commencement of the Act and those contracted after such commencement. So the position is that in respect of the secured loans, the Court can always grant instalments hereunder irrespective of the question when the loan was made. In the case of unsecured loans, granting of instalments *under this Act* is possible only if the loan was contracted before the commencement of this Act and not if it was contracted since that date. The section, however, does not override the power of the Court to grant instalments under the provisions of O. xx, r. 11 of the Code of Civil Procedure, 1908. In respect of the *post*-Act loans the provisions of said O. xx, r. 11 will be still available. In respect of the pre-Act unsecured loans, it will be for the defendant to elect whether he would claim the more lenient provisions of this section or he would remain content only with the benefit of said O. xx, r. 11 of the C. P. Code.

Instalments cannot be granted *suo motu*.

It must have been seen that the provision about the grant of instalments is imperative (*vide* p. 146, *ante*), but that does not mean that the Court can *suo motu* pass an order for payment by instalments. It is necessary that the defendant should make an *application* in that behalf. If no such application is made, the Court is to proceed on the rules prescribed in the Civil Procedure Code. When an application praying for instalment is made by the defendant, the Court will *hear* the plaintiff in answer to the defendant's prayer. If the Court finds no satisfactory reason for refusing the defendant's prayer for instalment, it should, at the time of passing a preliminary decree under Rule 2 or Rule 4 of Order xxxiv, direct that the total decretal money as ascertained under the said rules be paid in a number of *annual*

instalments. The Act does not authorise the Court to make a direction for payment in *monthly* instalments. As to in *how many* annual instalments the decretal amount is to be paid or as to on what dates the said instalments are to be paid, the Courts have been given a **discretion.** The Court's discretion always means judicial discretion exercised upon recognised principles, *Abdul Aziz* v. *Nanhe Khan,* 49 All. 332=25 A.L.J. 248=A.I.R. 1927 All. 458=101 I.C. 529. Unless the Lower Court acts capriciously or in disregard of legal principles, the appellate Court should not interfere so as to substitute its own discretion for that of the Lower Court, *Rehmatun-nissa* v. *Price,* 45 I.A. 61=42 Bom. 380=27 C.L.J. 623=22 C.W.N. 601=45 I.C. 568 (P.C.). The words, "subject to such *conditions* as the Court may impose" show that sub-clause (i) of sub-section 1 (a) has authorised the Court to impose suitable terms on the parties regarding the question of payment by instalments. Imposition of terms may be necessary to prevent the defeasance of the Court's directions by subterfuges and devices and to ensure fair and honest dealing on both sides. The terms or conditions which a Court can impose hereunder should not offend against the fundamental principles of the Act, and if the Court does so that will be an improper or illegal exercise of its powers open to rectification by higher tribunals. The *number* of instalments and the *dates* on which these instalments are to be paid have to be fixed with reference to the *circumstances* of the plaintiff and the defendant and the amount of the decree. Not only the circumstances and means of the debtor, but also those of creditor have to be looked to, *Monorama Debi* v. *Wajaddi Akan,* 61 C.L.J. 93; see also *Balgobindram* v. *Cheddilal Saha,* 11 C.L.J. 431. If the plaintiff be rich and has other sources of income, so as not to be prejudiced by a deferred payment, the Court will consider it to be a circumstance warranting a distribution of the decretal money over a greater *number* of instalments. On the other hand, if the decretal money be the plaintiff's principal assets, or if he should chiefly depend on it for his subsistence, the Court should not allow a large number of instalments so that the plaintiff may not have to face the perils of starvation. The circumstances of the defendant are also a factor which will influence the Court's decision in the matter of fixing the number of instalments or of the dates of payment thereof. If the Court finds that the defendant is a pretty well-to-do man, it will be justified in giving such directions as to instalments as will lead to early repayment. The penury of the defendant or his having a large family to support or the smallness of his income may

Amounts, and dates of payment, of instalments depend upon the circumstances of the parties.

be circumstances to warrant the spreading out of the instalments over a great number of years so that the instalments may not operate harshly on him. The dates of payment of instalments should be fixed with reference to the harvest times as also with reference to the time when the defendant may possibly get, or expect to get, some funds or money from other sources and may therefore be in a position to pay. *Amount of the decree* also is another matter that may have something to do with respect to the fixation of the amount of instalments. The provision for granting instalments in the case of mortgage decrees is new and *pro tanto* supersedes the provision of O. xxxiv, rr. 2 & 4 of the Code of Civil Procedure. Cf. *Baliram* v. *Laxman,* 1940 N.L.J. 387.

Default in payment of instalments of a mortgage decree entitles the decree-holder to apply to make the preliminary decree final.

Sub-clause (ii) of sub-section (1) (a) says that the preliminary decree to be made under the section as aforesaid is to provide that in default of payment of any of the instalments fixed under sub-clause (i), the plaintiff shall after giving due notice (as prescribed hereunder) be entitled to apply for a final decree under Rule 2 (1) (c) (ii) or under Rule 4(1) of Order xxxiv of the C. P. Code, because it is on this date of default, that the whole amount determined by the preliminary decree or more accurately, the balance of dues, if there has been some payment, is considered to have become forthwith payable by the defendant to the plaintiff. Service of the prescribed notice is a condition precedent to the application for making the decree final in consequence of default in payment of instalments Default in payment of instalment operates as a removal of the cause which was deferring the making of a final decree, and in consequence, the process of culmination of preliminary decree into a final one should not any more be kept in abeyance. Read the observations of Rankin C.J. in *Taleb Ali* v. *Abdul Aziz,* 57 Cal. 1013=50 C.L.J. 566=A.I.R. 1929 Cal. 689=123 I.C. 305, F.B.

Under Rule 2 (2) or Rule 4 (2) of O. XXXIV, of the C. P. Code, the Court has power, if good cause is shown and upon proper terms, to extend the period of grace from time to time and defer the time for passing a final decree. Under **Proviso** (i) of this section, this power of the Court conferred by the C. P. Code will not in any way be affected by the provisions of clause (a) of sub-section (1) of this section, so that if good cause is shown the time for payment can always be extended.

Proviso (ii) to said clause (a) says that when a default is made in the payment of any one of the instalments fixed by the Court under sub-clause (ii) of sub-section (1) (a), and a notice

is given by the plaintiff to the defendant in accordance with the provisions of the sub-clause (ii), and the defendant, in obedience to the notice, pays off the amount of the over-due instalment, the Court will condone the default and defer the passing of the final decree till a fresh default is made in respect of any of the subsequent instalments.

Sub-sec. (1), clause (b): Unsecured loans contracted before the commencement of this Act.

Clause (b) of sub-section (1) of the section provides for payment of the decretal money by means of instalments. The provisions of this clause apply only in relation to the loans *advanced before the commencement of this Act other than* those referred to in clause (a), that is, this clause is restricted to the unsecured loans contracted before the commencement of this Act. The *post*-Act unsecured loans are not in the contemplation of this clause. The secured loans have been provided for in clause (a) and this clause refers to loans *other than* those secured loans. As to Court's power to grant instalments in relation to the *post*-Act unsecured loans, *vide* notes at p. 147, *ante*.

Instalments in respect of unsecured loans.

The question of granting instalments may arise (1) *before* a decree has been made in the suit instituted for the recovery of the loan, or (a) after a decree has already been made in the case. Sub-clause (i) of the sub-section (1) (b) contemplates the first case and sub-clause (ii) of that sub-section contemplates the second one. But in either case, it is necessary that there there should be *an application* praying for instalments made by the defendant or the judgment-debtor, as the case may be. The Court cannot make an order for instalments *suo motu*. When an application praying for the grant of instalments has been made by the defendant (in the case where the Court has yet to make a decree) or by the judgment-debtor (in the case in which a decree has already been made in the suit), the Court should invite objections, if any, to the said application from the plaintiff or the decree-holder, as the case may be, and after hearing the parties, give necessary directions in the matter. The clause applies to the *pre*-Act unsecured loans, although it may happen that the decree on a loan in question is made or is about to be made after the passing of this Act. This position is apparent from the words "whether before or after the commencement of this Act" occurring in sub-clause (ii) of sub-section (1) (b). It is worthy of mention that decrees of Court have always been regarded by law as sacrosant and inviolable but the present Statute considers them to admit of easy subversion and profanation.

No time-limit for application for instalment by a judgment-debtor.

There is no time-limit for a judgment-debtor applying for the grant of an order for instalment. The mere fact that the decree-holder has made his application for execution is no ground for rejecting the judgment-debtor's application for instalment. This is clear from the words, "at any time" in sub-clause (ii) of clause (b), sub-section (1). Although the expression "at any time" is very wide in its scope, still it is subject to one limitation namely, that some part of the decretal claim has remained unsatisfied. After the debtor's property has been put to auction sale and the decree-holder's bid has been accepted, an application for instalments cannot any more be entertained, comp. *Krishnarao* v. *Bhanu,* 1938 N.L.J. 15. The application for grant of instalment should however be presented to the Court which has passed the decree and not to the executing Court; this is because the executing Court is bound to take the decree as it stands and is incompetent to go behind the decree, see *Soshi Kanta Acharji* v. *Raja Sarat Chandra,* 35 C.L.J. 339; also *Dilsukh Rai* v. *Lachman Das,* A.I.R. 1927 Lah. 894=100 I.C. 156—referring to 40 Mad. 233 (F.B.); *Amalabala Dasi* v. *Sarat Kumari,* 54 C.L.J. 593; *Jatindra Mohan Banerji* v. *Raj Lakshi Debi,* 43 C.W.N. 271; *Jitendra Nath* v. *Nagendra Nath,* 39 C.W.N. 54; *Lal Behary Chatterjee* v. *Jagat Jiban,* 43 C.W.N. 602.

Order for instalment can be made only *after* hearing the parties.

It is incumbent upon the Court to hear the parties before making an order for instalments. An omission to hear the parties will be an *illegality* or a material irregularity vitiating the order and will render it assailable in appeal by virtue of the provisions of sub-section (3), *post.* Such an omission however does not render the order for instalment void *ab initio* or a nullity, with the result that if it is not corrected on appeal, it becomes final.

The instalments to be granted under the section should ordinarily be *annual* (and not monthly or quarterly or half yearly); but this does not mean that the Court has no power hereunder to direct that the *annual* instalments be divided into 12 equal parts, each part being payable monthly. That the Court has such power is clear from the words, "subject to such conditions as the Court may impose". Although it is possible to break up an annual instalment in twelve *monthly* parts, still it seems that the question of default in relation to an instalment should be determined with reference to the annual amount and not to its monthly parts. The instalments can be distributed over a period *not exceeding*

twenty years. This is the maximum period fixed by the statute, which should not be transgressed on any account. Within that period, the Court has a discretion as to the duration over which the annual instalments are to be spread out. But as seen above (*vide* p. 148, *ante*), the Court's discretion is a judicial discretion to be exercised with reference to the circumstances of the parties and the amount of the decree. In this connection read the notes at pp. 148-49, *ante*. Fixation of instalments by **consent** of parties, if not offending against the principles of the Act may be permitted, as such an arrangement or contract is not *forbidden by law* within the meaning of section 23 of the Indian Contract Act.

The provision made in the concluding words of the sub-section are very important. It says that *if default is made in payment of any particular instalment, execution can be levied only in respect of that particular instalment in default and not in respect of the entire decree.* "Default" always means default in payment of the annual instalments and not of its monthly parts.

The words, "without interest" show that the Court cannot give any direction for payment of **interest** in respect of the instalments. But when a default is made in respect of any of the instalments, and the decree-holder is compelled to levy execution in respect of the same, the instalment in default will carry interest at the rate of 6 p.c. p.a. from the date of default provided that the decree-holder has given a previous notice of demand before filing his execution application. Provision in that respect has been made in sub-section (2) of the section.

As seen above, **sub-section** (2) makes provision for payment of interest on an instalment in arrears. The rate of interest is 6 p.c. p.a.; this is, however, the maximum rate which should not be over-reached on any account; but this does not mean that the maximum rate is to be allowed in every case. The Court has a discretion to vary the rate *within the maximum* fixed by the statute. In order to be entitled to claim interest on the instalment in arrears, the decree-holder must give the judgment-debtor a notice of demand before he levies excution. This is a condition precedent to his claim for interest. The prohibition of interest on decretal amount contained in section 31 (a) does not control sub-section (2) of this section.

Sub-section (2) is circumscribed by *two provisos.* The **first proviso** authorises the Court to grant an extension of time for the payment of any particular instalment. But this power can be exercised only *before* an order has been made *for execution* of the decree. An "order for execution" means the order contemplated by sub-section (4) of O. xxi, r. 17 of the C. P. Code. Extension

of time for payment of an instalment after an *order for execution* has been made is *ultra vires,* and carries no legal effect. Extension of time under the first proviso may be for any period *not less than a year* from the date of payment of the instalment in question, but such extension should on no account go beyond the twenty years contemplated by clause (b) of sub-section (1) of the section. Where an extension of time is granted in respect of an instalment, the same cannot any more be considered to be in default with the result that the question of executing the same or of running of interest in relation thereto cannot any more arise. In other statutes, the law limits the *maximum* period for which an extension of time may be granted, but here just the reverse has been done, because this enactment is anxious to see that the benefit to a borrower does not fall beneath a certain minimum limit.

The **second proviso** says that if the judgment-debtor after receiving the notice contemplated in sub-section (2) and prior to an order for execution under Order XXI, r. 17, deposits in Court the amount of any instalment in arrears, execuiton cannot any more be levied in respect of the same. In order to be entitled to the benefit of the proviso the judgment-debtor should deposit the amount of the instalment in question *in Court.* A private payment *out of Court* by the judgment-debtor does not entitle him to the benefit of this second proviso.

Sub-section (3) : **Appeal :** An order under sub-clause (ii) of clause (b) of sub-section (1) is to be regarded as an order made under section 47 of the Code of the Civil Procedure and the effect of this is that the order will fall within the scope of section 2 of the C. P. Code and be appealable in consequence. Such an appeal is however a miscellaneous appeal, because the order *is* after all not a decree *in actuality* but only has the effect of a decree ; notice the word "deemed" in section 2 of the C. P. Code. The Patna Court maintains the view that an order determining instalments under section 11 of the Bihar Money-Lenders Act is not appealable as an order under section 47 of the C. P. Code (because it is not an order *finally* determining the rights of the parties), *Dhanukdhari* v. *Ramratan,* 1940 P.W.N. 492. An order under sub-clause (1) of clause (b) of sub-section (1), which is made at the time of passing the decree is itself a decree and is appealable under section 96 of the C. P. Code. Therefore, the Legislature has thought it unnecessary to make any special provision regarding it as it has done in respect of a *post*-decree order for instalment under sub-section (1) (b) (ii). In either of the two aforesaid cases, there will be a **second appeal.** In the former case, it will be an appeal from an appellate order or a second miscellaneous

appeal; in the latter case, it is an appeal from appellate decree or a mere 'second appeal.' The Court fees payable on a first miscellaneous appeal to the District Court is only Re. 1/- and that on a second miscellaneous appeal is Rs. 5/- [See Art. 11 of Schedule II of the Court Fees Act as amended in Bengal]. When the instalments are embodied in the decree itself and the parties prefer appeals against the instalment decree, it is not necssary for them to pay an *advalorem* Court fees on the whole amount. If the plaintiff appeals he is to pay upon the difference between his claim in lump and the *present value* of the instalments, see *Lukhun Chunder* v. *Khodabuksh,* 19 Cal. 272; *Gobindlal* v. *Rao Baldeo,* 24 I.C. 931. Such present value is determined by deducting the *interest* lost by reason of the deferred payments. If the defendant appeals, he is to pay upon the loss he suffers, according to his own calculation, because of the inflation of the amount of, or shortening of the period for, the instalments. No appeal has been provided against the stay order contemplated in Cl. (c) of sub-section 1, because such an order is an interlocutory one and cannot be regarded as a final order under section 47 of the C. P. Code. The rulings in *Nafar Chandra* v. *Kalipada Das,* 44 C.W.N. 364 and *Abinash Chandra* v. *Bibhuti Bhusan,* 44 C.W.N. 587, which were based on different considerations do not warrant a contrary view.

Court-fees.

Sale of property in execution of decrees in respect of loans.

35. Notwithstanding anything contained in any other law for the time being in force, the proclamation of the intended sale of property in execution of a decree passed in respect of a loan shall specify only so much of the property of the judgment-debtor, as the Court considers to be saleable at a price sufficient to satisfy the decree and the property so specified shall not be sold at a price which is less than the price specified in such proclamation:

Provided that, if the highest amount bid for the property so specified is less than the price so specified, the Court may sell such property for such amount, if the decree-holder consents in writing to forego so much of the amount decreed as is equal to the difference between the highest amount bid and the price so specified.

Execution of Decrees in respect of loans by sale of judgment debtor's Property : Section 51 of the Code of Civil Procedure read with O. xxi, r. 30 thereof authorises a Court to execute a decree for the payment of money passed by it by attachment and sale of the judgment-debtor's property and the present section makes a special provision for the mode of execution when the decree is *in respect* of a *loan.* The term "loan" has been defined in section 2 (12). Unless the decree for payment of money is in respect of a *loan* as defined in this Act, this section will have no application. The mere fact that the decree is for recovery of a *debt* or other dues, not amounting to a *loan,* is not sufficient to render the special procedure of this section applicable. Under the provisions of section 51 and O. xxi, r. 30 of the Code of Civil Procedure there is no restriction on a decree-holder in the matter of seezing his judgment debtor's properties, so that whatever might be the *amount* of his decree he can pursue *any* property of the judgment-debtor [see section 51 (b) of the C. P. Code], however big that property might be. This wide freedom of action in the matter of execution has been considerably curtailed by this section. Under it, the holder of a decree for recovery of a *loan* can follow only so much of the property of the judgment-debtor as is just sufficient to cover the amount of his decree. Such a decree-holder should include in his sale-proclamation only so much of the property of a judgment-debtor as is sufficient to satisfy his decree. To this extent the corresponding provisions of the Code stand superseded and this the Legislature have made clear by the opening condition, *viz.,* "Notwithstanding any thing contained in any other law for the time being in force." Under this section the Court should determine the value of the property mentioned in the sale proclamation and if it finds that such valuation far exceeds the amount of the decretal claim it would reduce the quantum of the property so as to bring its value down to the level of decree-holder's claim. The word "consider" in the section implies a judicial investigation of the matter. Omission to fix the value of the property as required by this section will constitute a material irregularity vittiating the sale within the meaning of O. XXI, r. 90 of the Code of Civil Procedure. Of course, if the judgment-debtor stands by or acquiesces in the irregularity the position will be different and he may be precluded from challenging the sale under said O. XXI, r. 90, by reason of waiver or of the Doctrine of Estoppel. In this respect the principle of law enunciated in *New Birbhum Coal Co.* v. *Surendra Nath Laik,* 37 C.W.N. 1054=A.I.R. 1934 Cal. 205=150 I.C. 504 and *Piramal* v. *Basanti Das,* A.I.R. 1935 Cal. 614=158 I.C. 556, may legitimately be invoked. When the Court has fixed the value of the property as required by this section, it cannot any more be

sold for a price less than that value, except in the special circumstance contemplated by the **Proviso** to the section, which says that where the highest bid falls short of the amount fixed by the Court, the property can be knocked down to such bid if the decree-holder *foregoes* his claim for the amount of difference between the amount fixed by the Court and that of such bid. The fact of such relinquishment by the decree-holder should be reduced *to writing*. If the relinquishment is made by the decree-holder only *orally* and not *in writing* and the Court relying on such *oral* relinquishment knocks down the property to the highest bidder, that will not preclude the decree-holder from subsequently repudiating the relinquishment because there can be no estoppel against the statute.

The provision of the section is mandatory as will appear from the use of the word "shall" in the section.

The word "property" being used in the section in a general sense, it will apply to both the kinds of property, movable and immoveable.

Effect of valuation of property under this Section : The valuation of property under this section by the Court being a *judicial* decision, the Doctrine of Finality applies to it with the result that the judgment-debtor cannot any more set up the plea that he has suffered substantial injury by the sale within the meaning of O. XXI, r. 90 of the C. P. Code.

Appeal : An order determining the value of the property under this scetion does not fall within the scope of section 47 of the Code of Civil Procedure and is not open to any appeal, see *Deoki Nandan* v. *Bansi Singh*, 14 C.L.J. 35=16 C.W.N. 124 ; *Panch Duar Thakur* v. *Mani Raut*, 16 C.W.N. 970—followed in *Jogesh Chandra* v. *Hemendra Kumar*, 35 C.L.J. 170 ; *Sashi Kanta Acharjee* v. *Fooljan Bewa*, A.I.R. 1925 Cal. 1184=96 I.C. 567 ; *Basanta Kumar* v. *Baikunta Nath*, A.I.R. 1926 Cal. 610=91 I.C. 819. Cf. *Debendra* v. *Kailash*, 29 C.W.N. 556.

Revision : An omission to determine the value as required by this section will be an instance of failure to exercise jurisdiction within the meaning of clause (b) of section 115 of the Code of Civil Procedure and it will be open to the High Court, in the exercise of its revisional jurisdiction under that section, to set the matter right.

36. (1) Notwithstanding anything contained in any law for the time being in force, if in any suit

to which this Act applies, or in any suit brought by a borrower for relief under this section, whether heard *ex-parte* or otherwise, the Court has reason to believe that the exercise of one or more of the powers under this section will give relief to the borrower, it shall exercise all or any of the following powers as it may consider appropriate, namely shall—

Reopening of Transactions.

(*a*) reopen any transaction and take an account between the parties;

(*b*) notwithstanding any agreement, purporting to close previous dealings and to create new obligations, reopen any account already taken between the parties;

(*c*) release the borrower of all liability in excess of the limits specified in clauses (1) and (2) of section 30;

(*d*) if anything has been paid or allowed in account on or after the first day of January, 1939, in respect of the liability referred to in clause (*c*) order the lender to repay any sum which the Court considers to be repayable in respect of such payment or allowance in account as aforesaid:

Provided that in the case of a loan to which the provisions of sub-section (2) of section 29 apply the lender or money-lender and each of his assignees shall be liable to repay the sum which the Court considers to be repayable in respect of, and in proportion to, the sum received by such lender or money-lender and such assignee;

(*e*) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, and if the lender has parted with the security, order him to indemnify the

borrower in such manner and to such extent as it may deem just:

Provided that in the exercise of these powers the Court shall not—

(*i*) reopen any adjustment or agreement, purporting to close previous dealings and to create new obligations, which has been entered into at a date more than twelve years prior to the date of the suit by the parties or any person through whom they claim, or

(*ii*) do anything which affects any decree of a Court, other than a decree in a suit to which this Act applies which was not fully satisfied by the first day of January, 1939, or anything which affects an award made under the Bengal Agricultuarl Debtors Act, 1935.

Explanation.—A decree shall not, for the purposes of this section, be deemed to have been fully satisfied so long as there remains undispoed of an application by the decree-holder for possession of property purchased by him in execution of the decree.

(2) If in exercise of the powers conferred by sub-section (1) the Court reopens a decree, the Court—

(*a*) shall, after affording the parties an opportunity of being heard, pass a new decree in accordance with the provisions of this Act, and may award to the decree-holder such costs in respect of the reopened decree as it thinks fit,

(*b*) shall not do anything which affects any right acquired *bona fide* by any person, other than the decree-holder, in conse-

quence of the execution of the reopened decree.

(*c*) shall order the restoration to the judgment-debtor of such property, if any, of the judgment-debtor acquired by the decree-holder in consequence of the execution of the reopened decree as may be in the possession of the decree-holder on the date on which the decree was reopened,

(*d*) shall order the judgment-debtor to pay to the decree-holder, in such number of instalments as it may think fit, the whole amount of the new decree passed under clause (*a*), and

(*e*) shall direct that, in default of the payment of any instalment ordered under clause (*d*), the decree-holder shall be put into possession of the property referred to in clause (*c*) and that the amount for which the decree-holder purchased such property in execution of the reopened decree shall be set off against so much of the amount of the new decree as remains unsatisfied.

(3) In this section the expression "suit to which this Act applies" includes a proceeding in respect of any application relating to the admission or amount of a proof of a loan advanced before or after the commencement of this Act in any insolvency proceedings.

(4) This section shall apply to any suit whatever its form may be, if such suit is substantially one for the recovery of a loan or for the enforcement of any agreement or security in respect of a loan or for the redemption of any such security.

(5) Nothing in this section shall affect the rights of any assignee or holder for value if the Court is satisfied that the assginment to him was

bona fide, and that he had not received the notice referred to in clause (*a*) of sub-section (1) of section 28.

(6) Notwithstanding anything contained in any law for the time being in force,—

(*a*) the Court which, in a suit to which this Act applies, passed a decree which was not fully satisfied by the first day of January, 1939, may exercise the powers conferred by sub-sections (1) and (2)—

(*i*) in any proceedings in execution of such decree, or

(*ii*) on an application for review of such decree made within one year of the date of commencement of this Act, and the provisions of rules 2 and 5 of Order XLVII of the First Schedule to the Code of Civil Procedure, 1908, shall not apply to any such application;

(*b*) any Court before which an appeal is pending in respect of a decree referred to in clause (*a*) may either itself exercise the like powers as may be exercised under sub-sections (1) and (2), or refer the case to the Court which passed the decree directing such Court to exercise such powers and such Court shall after exercise thereof return the record with the additional evidence, if any, taken by it and its findings and the reasons therefor to the Appellate Court and thereupon the provisions of rule 26 of Order XLI of the First Schedule to the Code of Civil Procedure, 1908, shall apply.

Reopening of Transactions : The section confers powers on the Court to reopen certain transactions, and the Court can exercise these powers *notwithstanding anything contained in any law for the*

time being in force. Such powers can be exercised by the Court only (1) in relation to a suit *to which* this Act applies or to a suit instituted by a borrower for relief under this section, *and* (2) if the Court has reason to believe that the exercise of any of these powers will give relief to the borrower. Both these conditions have to be satisfied otherwise this section will not operate. So, it is not enough for the applicability of the section that the suit in question is one to which this Act applies or one which the borrower institutes for relief hereunder. Unless the Court has reason to believe that it can, by assuming power under this section, give relief to the borrower, it will not take action under this section. The term "relief" has not been defined in the Act. What relieves the debtor from the burden of his debt is *relief*. Ordinarily, "relief" means the remedy granted by a Court to a suitor. The expression "suit to which this Act applies" has been defined in section 2 (22). Such a suit must be one which has been instituted or filed on or after the 1st of January 1939, or at any rate been pending on that date. For the purposes of this section, the expression also includes an application tendering proof in an Insolvency proceeding, *vide* sub-section (3), *post*. A suit pending before an appellate or a revisional Court on 1st January, 1939, satisfies the requirements of the statute, *vide* notes at pp. 38-39, *ante*. The Court can exercise the powers contemplated by the section not only in the suit to which this Act applies but also in a suit instituted by the borrower praying for relief under this section. The section will apply whether the suit was heard *ex parte* or on contest. The mere fact that the borrower has defended the suit and failed in the first instance will not prevent the Court from exercising the powers conferred by the section. That is, the rule of *res judicata* will not defeat the operation of the provisions of the Act and the doctrine of finality will be of no avail to the lender to secure him the benefit of the decree he has obtained. If the case has been heard *ex parte* and the borrower is not coming forward to contest, even then the Court can exercise the powers *suo motu*. The word "otherwise" has been designedly used to cover even the case where the defendant has confessed judgment [Cf. *S. P. R. M. Firm* v. *Maung Po Kya*, 1 Rang. 580=A.I.R. 1924 Rang. 144=77 I.C. 382]. Even when a case is heard *ex parte*, the Court is under an obligation to apply his judicial mind, and the proper law, to the case [*Narendra Nath* v. *Paban Mandal*, 52 C.L.J. 73=A.I.R. 1930 Cal. 776=130 I.C. 254; *Kering Rupchand* v. *A. S. B. Bayley*, 44 Bom. 775=58 I.C. 433]; the *ex parte* cases and contested cases have been put on the same footing in this sub-section. The word "otherwise" covers also

The section may be applied even when the original case was heard *ex parte* or otherwise.

the case where the points favourable to the defence have not been raised by the defendant in his pleading, *Nana Mia v. Manu Mia,* A.I.R. 1925 Cal. 392=82 I.C. 830. The contrary view of the Nagpur Court in this respect, [*Bhadu* v. *Ganapati,* A.I.R. 1931 Nag. 25=130 I.C. 103], is not supportable. Under the English Money Lenders Act, 1900 (section 1), the Court has no power to re-open a money-lending transaction or to direct the taking of accounts on a new basis, if such a transaction has been the subject of a judgment of Court, and this is the position even where the transaction amounts to a harsh and unconscionable bargain between the money-lender and the debtor, [*Cohen* v. *Jonescu,* (1926) 1 K.B. 119=95 L.J.K.B. 100]. The effect of the present section is to render this English principle inapplicable to this Province. The words "give relief to the borrower" show that powers hereunder can be exercised only for the benefit of the borrower, and at his instance or even *suo motu*. The creditor cannot ask the Court to move under this section on the ground that injustice has been done to him, nor will the Court move *suo motu* for the reason that the creditor has not got all that he is entitled to. If the requirements of this section are complied with, it will be obligatory upon the Court to exercise the powers specified in it; this is clearly indicated by the use of the word, "shall". When a proper case is made out, the Court will be bound to exercise all or any one of the powers mentioned in the several sub-clauses of sub-section (1). No option or discretion has been left to the Court to do or act otherwise. If the Court be failing in the performance of its plain duty under this section, an appellate or revisional Court (as the case may be) will interfere to correct its proceedings. The powers which the Court can exercise under this section, are—

Only the debtor and not the creditor can move the machinery of this section.

(*a*) power to reopen any transaction and take accounts between the parties in connection therewith;

(*b*) power to reopen the accounts already taken

(*c*) power to release the borrower from all liability in exess of the limits prescribed in section 30 (1) and 2;

(*d*) power to order refund of moneys realised since 1st January, 1939 in excess of statutory limits

(*e*) power to alter or supersede securities and to direct the lender to damnify the borrower in the event of his parting with the securities.

The power under Cl. (b) of sub-section (1) to re-open an account already taken exists, although the parties might have agreed to close all *previous dealings.* This has been made clear by the

opening words of the clause, *viz.* "Notwithstanding any agreement etc." The leading case on the question of opening previous dealings is *Halsey* v. *Wolfe,* (1915) 2 Ch. 330. The proviso to clause (d) makes the obligation of repayment of moneys realised in excess of statutory limits available against the money-lender's assignees, *Vide* notes at p. 169, *post.* It is worthy of mention here that the Court can take action under this section only in the interest of the borrower and not in that of the lender, and therefore, the latter cannot induce the Court to proceed hereunder.

Limitations of the Court's powers hereunder.

The power of re-opening transactions which the Court possesses under this section is subject to certain **limitations :** These limitations are—

(*i*) The Court shall have no power to re-open an adjustment or agreement between the parties or their legal representatives, closing previous dealings or creating new obligations, if the adjustment or agreement in question was effected, or entered into, more than 12 years prior to the suit.

(*ii*) The Court shall have no power to do anything in relation to a decree made in a suit outside the scope of this Act, although remaining unsatisfied before 1st January, 1939 or in relation to an award made under the Beng. Agricultural Debtors Act, 1935. [N. B. A decree is considered not yet fully satisfied if the decree-holder auction-purchaser's application for delivery of possession still remains undisposed of. The mere fact that a *stranger* auction-purchaser's application for possession remains undisposed of will not empower the Court to take action under this section if such stranger's auction purchase is confirmed and the decree is entered in the Suit Register as fully satisfied].

It is self evident that under this section the Court has no power to re-open any account in relation to dealings between the parties which are quite foreign to the transaction under investigation, Cf. *Saunders* v. *Newbold,* (1905) 1 Ch. 260, at pp. 267, 276-78 ; read also *Samuel* v. *Newbold,* (1906) A.C. 460 (467). It is only the the loan transactions between the parties, that is, those between lenders and borrowers, and the accounts in relation to such transactions that are capable of being re-opened under this section. It may be generally stated, as Sankey J. observed in *Glaskie* v. *Griffin,* (1914) 111 L.T. 712, at p. 713, that for a Judge to have to re-open and re-adjust a transaction is a most embarrassing jurisdiction. Read also the observations of Darling J. in *Jackson* v. *Price,* (1909) 26 T.L.R. 106 and those of Scrutton J. in *King* v. *Hay Currie,*

(1911) 28 T.L.R. 10. Under section 3 of the Usurious Loans Act, a Court can re-open a transaction only if the interest is excessive or if it is *substantially unfair,* [*Narendra* v. *Paban,* 52 C.L.J. 73= A.I.R. 1925 Cal. 302=82 I.C. 830; *Din Mahomed* v. *Badrinath,* A.I.R. 1930 Lah. 65], but the power under this section to re-open a transaction is much wider and is not limited to cases of unconscionable bargains but in all cases in which relief can be granted to the borrower in conformity with the palliative provisions of this Act.

Even decrees on compromise can be re-opened.

Otherwise : The word "otherwise" in sub-section (1) is wide enough to cover not only the contested cases but also those cases in which decrees have ultimately been made on reference to arbitration or on **compromise.** So it would seem that even compromise decrees can be re-opened under the section. This view will receive support from *Man Mohan Das* v. *Ijhar Husain,* I.L.R. 1937 All. 536=A.I.R. 1937 All. 449=168 I.C. 191—a case decided by the Allahabad High Court under the U. P. Agriculturists' Relief Act (xxvii of 1934). For the import of the word "otherwise" read also the notes at p. 161, *ante.* Under the English Money-lenders Act of 1900, it was held in one case that where a money-lending contract contained a default clause of a very penal character relating to the re-opening of previous transactions between the parties which had been closed or compromised, the bargain could be regarded as harsh and unconscionable and re-opened on that ground, see *Cohen* v. *Jonescu,* 69 S.J. 381. Under the present Bengal Act, the mere fact that the compromise or agreement offended against its provisions would render the matter liable to be ripped up irrespective of the question whether it was harsh or unconscionable. This Act like section 178 of the Bengal Tenancy Act protects the people from their own improvident contracts; read the notes at p. 126, *ante.* When the case of *Cohen* v. *Jonescu, supra,* went up in appeal [see *Cohen* v. *Jonescu,* 70 S.J. 138=42 T.L.R. 41], the appellate Court held that the Court has no jurisdiction to re-open a prior money-lending transaction between the parties which had resulted in a judgment for the plaintiff by consent. The Bengal Money-Lenders Act departs from this English ruling.

Debtor's suit for relief under this Section : This section authories a Court to exercise the powers contemplated by it not only in a suit to which this Act applies but also in a suit instituted by a borrower for the definite purpose of obtaining relief under this section. Thus, the section authorises a debtor's suit for obtaining relief hereunder. Such a suit must start with the presentation of a

plaint [see section 26 and Order IV, r. 1 of the C. P. Code] and conform to the requirements of Or. VII, r. 1 of the said Code as far as practicable. The prayer portion of the plaint should specifically mention which of the several reliefs contemplated in the various clauses of sub-section (1) of this section are sought by the borrower. When the relief sought is for refund of the amount of the excess payment made since 1st January, 1939, under Cl. (d) of sub-section (1) the borrower should pay *ad valorem* **Court Fees** on the amount claimed as a refund on proper calculation. In other cases, the suit is to assume the form of a mere claim for a declaratory decree without consequential relief or a claim without any estimable money value, and the Court fees payable will be under Cl. iii or cl. vi, (as the case may be) of Art. 17 of the Second Schedule of the Court Fees Act which prescribes a fixed fee of Rs. 15. When the suit assumes the form of one to obtain a declaratory decree with consequential relief or one for accounts within the meaning of clauses (c) and (f) respectively of section 7 (iv) of the Court Fees Act, the plaintiff will have the option of valuing his relief and pay *ad valorem* on his own assessment. When an *ad valorem* fee is paid, the valuation of the suit for the purposes of jurisdiction will be under section 8 of the Suits Valuation Act [*Re Kalipada Mukherjee,* 34 C.W.N. 870]. In the other cases, the jurisdiction of the Court is to go by the plaintiff's valuation till rules are framed by the High Court under section 9 of the Suits Valuation Act. Of course, the Court can hold enquiries into the method of borrower's valuation under section 8C of the Court Fees Act or correct such valuation under O. VII, r. 11 of the C. P. Code, but until necessary rules are framed by the High Court under section 9 of the Suits Valuation Act to give the Courts a guidance in the matter, they will be helpless for want of necessary materials in the matter of pronouncing against the borrower's valuation, read *Narayanganj Central Co-operative Sale & Supply Society* v. *Mafizuddin Ahmed,* 38 C.W.N. 589, F.B. A borrower's suit for relief under this section should be instituted within the period of **limitation** or time-limit indicated in the **Explanation** appended to sub-section (1), which please see.

The Court has reason to believe : The powers mentioned in sub-section (1) can be exercised only *if the Court has reason to believe* that the exercise of such powers will give relief to the borrower. The words "the Court has reason to believe" are used in modern legislative drafting to confer power on a Court to proceed *suo motu* and to take action even when a high standard of proof as required by the Indian Evidence Act is wanting. When the Court has to be moved by a party to take a particular action there is no relaxation in the method of proof and in such cases, the

following expressions are generally used by the Legislature—"on the application of so and so", "where the Court is satisfied" and similar other expressions. With respect to the significance of this expression, Mukherjee J. has thus observed in *Narendra Nath Mitra* v. *Paban Monlal,* 52 C.L.J. 73 (76)=A.I.R. 1930 Cal. 776=130 I.C. 254: "The words 'has reason to believe' have a significance. The Indian Legislature has said in some other Act that a person is said to have reason to believe a thing if he has sufficient cause to believe that thing, *but not otherwise.* It is only when the circumstances are such that a reasonable man would be led by a chain of probable reasoning to the conclusion or inference that the thing exists, though the circumstances may fall short of carrying absolute conviction to the mind of all persons, that the phrase is satisfied. *The words however mean something more than mere suspicion.*" In section 26 of the Indian Penal Code, a person is said to have "reason to believe" a thing if he has sufficient cause to believe that thing *but not otherwise.* When Mukherji J. spoke of "some other Act" in the passage quoted above, he evidently referred to the said section 26 of the Indian Penal Code. Section 96 of the Criminal Procedure Code is another section in which the expression "the Court has reason to believe" occurs. Therefore, that section also may be consulted for ascertainment of the true significance of the above expression. From the above it is clear that a Court can take action under this section although it has not been formally moved by any party and although legal evidence to carry conviction be wanting. It is enough if there is good reason to induce the Court to proceed in the matter, but the Court should on no account proceed on a mere ill-defined suspicion, because such a vague suspicion can never be a ground for any Judicial decision [*Mahomed Mehdi* v. *Mandir,* 39 I.A. 184=34 All. 511=16 C.L.J. 629=17 C.W.N. 49 (P.C.). The phrase has been designedly used by the Legislature to place the spring of Judicial action somewhere between legal proof and mere suspicion. The Court will have power to raise a point of its own motion under this section, although it has not been specifically raised by any of the parties concerned, comp. *Nana Mia* v. *Manu Mia,* A.I.R. 1925 Cal. 392=82 I.C. 830.

Clauses (a) & (b) : **Re-open any transaction or any account :** This is the first power that the Court can exercise under this section. *Re-opening* of any transaction or account means that the Court will re-consider and hold fresh investigation into the affairs of the loan with a view to ascertaining what will be the actual liability in respect of it in accordance with the provisions of this new Act. The transaction or account referred to herein must be one that relates to the loan under consideration, [see

Saunders v. *Newbold,* (1905) 1 Ch. 260]. The ordinary rule of law that a closed or an adjusted account cannot be re-opened except on grounds of fraud, mistake or undue influence [*Bharat Chandra* v. *Kiran Chandra,* 52 Cal. 766=A.I.R. 1925 Cal. 1069=90 I.C. 944 ; *Abdul Rahim* v. *H. V. Low,* 3 Rang. 1=89 I.C. 598 ; *Krishna Bhatta* v. *Iswar Bhatta,* A.I.R. 1937 Mad. 579=169 I.C. 860] is virtually superseded by this section in relation to loans which come within the operation of this Act. The mere fact that accounts have already been taken between the parties and the parties have agreed to close all previous dealings and have entered into contracts and created new rights will not prevent the Court from ripping up the whole affair and start afresh and re-adjust the accounts on the basis of the new law of this Act and for this purpose, if necessary, the Court can re-open even a decree of Court under sub-section (2) of this section. This however is subject to the limitation indicated in the two clauses of the *Proviso* to sub-section (1). The Court should not re-open transactions or dealings which were adjusted or closed at a date more than 12 years prior to the suit in which these transactions and dealings are sought to be re-opened. Proviso (1) will apply although the adjustment of accounts was effected and the agreement to close previous dealings or to create new obligations was entered into by the predecessors-in-interest of the present parties, provided the time-limit of 12 years is not transgressed. The old decrees can be re-opened for the purposes of these two clauses, only if they were made in a suit amenable to this Act and have remained not *fully satisfied* within the meaning of the *Expanation* to this section, *vide post.* Awards made under the provisions of the Bengal Agricultural Debtors Act cannot, however, be re-opened.

No transactions can be re-opened under these clauses, unless it can be shown that the newly created rights and obligations which form the subject-matter of the present dispute are in some way or other connected with those transactions, *Saunders* v. *Newbold,* (1905) 1 Ch.D. 260. There must be some connecting link, say, some sort of agreement or understanding to connect an anterior transaction and the newly created rights and obligations, read *Halsey* v. *Wolfe,* (1915) 2 Ch. 330. Cf. *Audh Behari* v. *Akshay Kumar,* 44 C.W.N. 253=A.I.R. 1940 Cal. 211—dissenting from *Ghanasyam* v. *Nichols,* 42 C.W.N. 665.

Sub-section (1) (c) : **Releasing borrower from liability :** If in the exercise of the powers conferred by this section in the course of the original suit by the Lender for the recovery of his money (which is amenable to the provisions of this Act) or in the borrower's suit for relief, the Court finds, on a consideration of all the circumstances in relation to the loan-transaction, that

the liability of the borrower in respect of that loan exceeds the limits specified in clauses (1) and (2) of section 30, it will make an order or a declaration that the debtor be released from this excess liability. Section 30 has put a limitation both as to the nature and rate of interest and as to the total quantity of interest. If the Court finds that the rate of interest exceeds the limits of 8 or 10 p.c. (as the case may be) or that the interest is fixed on a principle of *rest* or that the total amount of interest (paid or accruing) has exceeded the amount of the principal, it will wipe out the excess amount by a suitable declaration. A borrower's suit for relief in the shape of release from excess liability must necessarily be in the form of a declaratory suit and Court fees have to be paid accordingly ; *vide* notes at p. 165, *ante*. An order or a decree releasing the debtor from excess liability being a declaratory one is incapable of execution. The declaratory suit contemplated herein may be considered to be independent of section 42 of the Specific Relief Act and therefore, not subject to the discretion of the Court in the way in which a suit under said section 42 is. Such a suit is also not liable to be defeated in consequence of omission to sue for consequential relief. This does not mean that consequential relief cannot be asked for in such a suit. It will be quite competent for the borrower to pray that his creditor be restrained by an injunction from attempting to enforce his excess claim. A decree releasing the debtor from excess liability will be a mere declaratory decree in relation to which no question of execution can possibly arise. Such a decree will however operate as *res judicata* on questions of the borrower's liability in all subsequent suits relating to the debt in question.

Cf. section 3(1) of the Usurious Loans Act, 1918 and *Lajtar Khan* v. *Nanhu,* A.I.R. 1929 Nag. 348=121 I.C. 60, which was decided with reference to the said section.

Surety : The term borrower includes his surety, see section 2(2), *ante* and read also the notes at p. 18, *ante*. Therefore, a surety seems to be entitled to the benefit of this section.

Sub-section (1) (d) : **Refund from Lender :** Release from liability under (c) is only a *negative* benefit for the borrower. The present clause provides for a *positive* benefit for him if he is found to have paid more than what he is liable for in accordance with the provisions of section 30. If upon taking the accounts or on a scrutiny of the payments made, the Court finds that payments have been made or credits have been given towards the excess liability ascertained from a reckoning according to the provisions of section 30 and from which he was entitled to obtain exoneration under clause (c), it will make an order of refund

from the lender of that excess realisation. No order to refund should, however, be made under this clause in respect of excess payments made or credits given prior to the 1st of January, 1939. The provision of this clause is very important, because it provides a great safeguard for the creditors who have already realised considerable amounts from the borrower far in excess of their dues calculated in terms of section 30. Such excess realisations, if falling beyond 1st of January, 1939, will not have to be refunded. The only effect of such realisation will be that the borrower will be *released* from further payments. A borrower's suit for refund will bear *ad valorem* **Court fees** : therefore, unless the excess realisations were made since 1st January, 1939, the borrower would do well not to claim refund under this clause but to rest content with a prayer for exoneration from liability under clause (c). The expression "any sum which the Court *considers* to be repayable" does not mean that the Court has a discretion in the matter of assessing the amount repayable by way of refund ; it simply means that the Court should decree refund only in respect of that amount which as a result of *adjudication* it finds to be due to the borrower.

N.B. The provisions of this clause are only *enabling* and do not in any way restrict or take away the right of refund which subsisted prior to 1st January, 1939 under the provisions of section 3(1)(b)(ii) of the Usurious Loans Act, 1918. The measure of the amount of refund under the said Act will be determined with reference to its own provisions and not with reference to those of this Act. Under the Act of 1918 the Court has power to order repayment of the excess realisations made by the plaintiff even though the defendant does not ask for that relief, *Lajbar Khan* v. *Nanu,* A.I.R. 1929 Nag. 348=121 I.C. 60. This seems to be the position under this Act also.

Notice the prepositions "on or after" "by" used in relation to 1st January, 1939. "By" means not later than. It has to be noticed that one or other of these prepositions have been used, according to circumstances, to include the first day of January, 1939. That this date is a holiday makes no difference.

Proviso to sub-section (1) (d) : **The position of Assignees of pre-Act loans :** It has been seen at p. 122, *ante,* that the position of the assignees of debts under loans advanced *before* the commencement of the Act is, by virtue of the provisions of section 29 (2), *ante,* the same as that of the money-lender himself. Therefore, it is but proper that when a transaction is re-opened under the provisions of this section, the assignee should be placed under the same obligation as regards repayment as the money-lender himself, otherwise, the salutary provision of this section

may be defeated by an assignment of the debt by the money-lender. The proviso to sub-section (2) (d) has made provision in that behalf, and by reason of it the assignee from the money-lender is bound to pay back all realisations since 1st day of 1939 in excess of the statutory limits prescribed by section 30 (1) and (2).

Proviso : What cannot be re-opened under this section : It has been seen at p. 163, that there are certain limitations on the Court's power under this section to re-open past adjustments of accounts or dealings between the parties and these limitations have been specified in the *Proviso* to sub-section (1) of this section. These are—

(*i*) previous adjustments of accounts and agreements closing previous dealings and creating new obligations, cannot be re-opened if such adjustments were effected or agreements entered into 12 years prior to the suit

(*ii*) decrees in suits not amenable to this Act cannot be re-opened

(*iii*) decrees in suits amenable to this Act can be re-opened only if they were *not fully satisfied* by the first day of January, 1939. The expression "not fully satisfied" has got a technical meaning which has been explained in the *Explanation to the Proviso*

(*iv*) Awards made under the Bengal Agricultural Debtors Act cannot also be re-opened. *Vide* notes at p. 99 of author's *Bengal Agricultural Debtors Act,* 1935.

N.B. Compare Proviso (i) of sub-section (1) with section 3(1)(b) of the Usurious Loans Act, 1918.

By reason of section 2 (22), suits instituted long before 1st January, 1939, can come within the operation of this Act and adjustments and dealings within 12 years of the institution of such suits being liable to be re-opened under this section, the propriety or legality of even very remote transactions can be subjected to fresh scrutiny by the Court. Transactions and dealings concluded 12 years prior to the institution of the suit are however safe. All decrees in respect of loans *remaining unsatisfied on* 1st January, 1939 will be within the operation of the Act. The expression "not fully satisfied" in Cl. (ii) of the Proviso has assigned a technical meaning by means of the *Explanation* appended thereto. If the decree-holder auction-purchaser's application for delivery of possession of the property purchased by him remains undisposed of on 1st January, 1939, the decree will be liable to be re-opened and re-adjusted under this section. This technical expression does not apply to a third party auction-purchaser's case ; so when the

property sold in execution sale was purchased by a person other than the decree-holder and such person put in the purchase money wherewith the decretal claim was satisfied and full satisfaction of the decree was entered in the suit register prior to 1st January, 1939, the decree will not any more be within the mischief of this section simply because of the fact that such *stranger* auction-purchaser's application for delivery of possession of the auction-purchased property remains undisposed of. Even in the case of a decree-holder auction purchaser if his application for delivery of possession was disposed of and only *symbolical* possession was given to him prior to 1st January, 1939, and the decree-holder thereafter institutes a *suit* for obtaining *actual* possession, the decree will not be within the mischief of the section, because the section contemplates only the non-disposal of an *application* for delivery of possession and not of a *suit* for the purpose. In dealing with this matter two points should always be kept in view : (1) As between the decree-holder and the judgment-debtor *symbolical* possession is as good as actual possession *Juggobundhu Mukherji* v. *Ram Chandra Bysack*, 5 Cal. 584, F.B.—followed in *Radha Krishna* v. *Rambahadur*, 22 C.W.N. 330 (P.C.) ; (2) The remedies by way of suit and application are concurrent, *Kishory Mohan* v. *Chandra Nath*, 14 Cal. 644. [For limitation see Art. 138 and Art. 181 of the Limitation Act]. If the decree has not been *fully* satisfied before 1st January, 1939, but has only been *partly* satisfied and execution is levied for the balance, since that date, the case will fall within the scope of this Act [see section 2 (22)]. In such a case a stranger purchasing in auction sale for a part of the decretal dues will have his protection under clause (b) of sub-section (2) of this section. Where an application is made under O. XXI, r. 90 of the C. P. Code for setting aside the auction sale and the same was pending on 1st January, 1939, the decree will come within the scope of the Act inasmuch as proceeding under O. XXI, r. 90 of the Code is a proceeding in execution within the meaning of section 2 (22) of the Act.

N.B. The proviso (i) of section 3(1)(b) of the Usurious Loans Act, 1918, also contains a 12 years' rule like Proviso (i) of sub-section (1) of this section. The difference between the two is that under the present Act, the period of 12 years is to be reckoned from the institution of the suit but that under the Usurious Loans Act is reckoned from the date of the transaction upon which the suit is based. Cf. *Raghunandan Prosad* v. *Commissioner of Income Tax*, 60 I.A. 133=57 C.L.J. 294=37 C.W.N. 570, P.C.

Sub-section (2) : **Duty of Court re-opening a transaction hereunder :** When in the exercise of the powers conferred by the

section, the Court re-opens a decree, it will be bound to perform the following duties, *viz.*

(*a*) it shall make a new decree, after giving the parties an opportunity of being heard on the merits of their cases, with costs to the decree--holder if thought fit

(*b*) it *shall* not do anything to prejudice the rights of a third party, (*bona fide* acquired in consequence of the execution of the re-opened decree).

(*c*) it *shall* direct restoration to the judgment-debtor of his property, which has been purchased in auction by, and is in the possession of, the decree-holder in consequence of the execution of the re-opened decree

(*d*) it *shall* make provision for payment of the *new* decree by means of instalments

(*e*) it *shall* direct that in default of payment of any of the instalments of the new decree, the property which was restored to the judgment-debtor upon re-opening of the decree should go back to the decree-holder auction purchaser, of course, the purchase money being set-off against the new decree.

The aforesaid duties enjoined upon the Court by the different clauses of sub-section (2) are of an imperative and obligatory character, as is apparent from the use of the word "shall" in each one of those clauses. If these mandatory directions are not carried out, any party aggrieved by the Court's error or failure will be entitled to take an **appeal** from the new decree made by the Court, and, get the defects cured by the appellate Court. While re-opening an old decree and substituting a new one in its place, the Court should give each party an opportunity to be heard on the merits of his case. This is in conformity with the legal maxim *audi alteram partem,* which embodies an elementary rule of universal application that judicial order which may possibly affect or prejudice any party cannot be made unless he has been afforded an opportunity to be heard, read *Ajanta Singh* v. *Christien,* 17 C.W.N. 862; *Jagannath* v. *Mohesh,* 25 C.L.J. 149 (152) ; *Rajendra* v. *Atalbehari,* 25 C.L.J. 456 ; *Satyendra* v. *Narendra,* 39 C.L.J. 279 ; *Ramnath* v. *Rudra Mahanti,* 18 C.L.J. 142 ; also the observations of Wiles J. in *Cooper* v. *Wordsworth,* (1863) 14 C.B.N.S. 180 (190)—cited with approval in *Gorachand* v. *Rakhal,* 37 C.L.J. 473. The *new decree* to be made under clause (a) of sub-section (2) must be in accordance with the provisions of this Act. This means that the decree should not transgress the limitations as to amount (of the loan) and the rate of interest prescribed in section 30, *ante.* The

direction as to costs for the new decree is absolutely in the discretion of the Court. If in execution of the decree, which the Court proposes to re-open under this section, any third person, that is, a person other than the decree-holder, acquires any right *bona fide*, it will not be in the power of the Court to give any directions affecting the interests of that party. If the Court in disregard of this mandatory provision does anything to the detriment of any such third party, the same will be *ultra vires* and it will possible for such third party to ignore the Court's order or to intervene in the proceeding before the Court and ask it to rectify its own order. There is, however, some risk in such intervention, because by courting a Judicial decision, the intervenor may subsequently find such decision, if adverse to him, to present insurmountable difficulties to him, by reason of the doctrine of finality of litigation. If it be the decree-holder himself, instead of a stranger, who has purchased the judgment-debtor's property in execution of his old decree, the Court, while re-opening the decree, should direct the decree-holder to restore the property to the judgment-debtor ; but this will be possible only if the decree-holder is still in possession of the auction-purchased property, but if on the other hand, the decree-holder has transferred away the property by an assignment or a sub-lease, and has put the assignee or the sub-lessee in possession of the property, then an order for restoration will be impossible. It may however happen that the assignment or sub-lease by the decree-holder is only a *benami* affair. The benamdar will be a mere name-lender or an *alias* for the decree-holder and the property will be considered, in point of reality, to be in the possession of the decree-holder himself, and the necessary order of restoration under Cl. (c) of sub-section (2) will be made. In such a case, however, it is desirable to implead the *benamdar* assignee or sub-lessee and the order of restoration should be made upon notice to him. If this is not done, the ostensible assignee or sub-lessee will not be bound by the order and may offer resistance to delivery of possession Cf. *Sheik Ismal* v. *Rajab Rowther,* 30 Mad. 295 following *Marimuthu Udayan* v. *Subbaraya Pillai,* 13 M.L.J. 231. [In the event of a stranger *bona-fide* purchasing from the decree-holder auction-purchaser, restitution is impracticable]. Comp. *Paresh Nath Mullik* v. *Hari Charan Dey,* 38 Cal. 622=14 C.L.J. 300=15 C.W.N. 875.

Bona fide auction-purchasers are not affected by the reopening of a decree.

Decree-holder auction-purchaser in possession is bound to restore property to J.D.

While re-opening a decree under this section, the Court should direct that the amount of the new decree be paid in instalments,

the amount and period whereof are to be fixed by the Court.

The new decree to be made payable in instalments.

Notice that clause (d) of sub-section (2) does not speak of *annual* instalments as section 34 does; consequently, it will be permissible for the Court to allow *monthly* instalments in relation to a new decree; therefore, the penalty of default in payment of an instalment of the new decree will visit the judgment-debtor sooner than in the case of defaults in relation to the instalments of the old decree. Clause (e) of sub-section (2) of the section prescribes the penalty to be inflicted on the judgment-debtor for failure to pay the instalments of the new decree on the appointed dates, and says that in default of payment of any instalment, the order for restoration of the auction-purchased property made under clause (c) of sub-section (2) in favour of the judgment-debtor will be abrogated and the decree-holder auction-purchaser will be put back in the possession of the property.

Clause (e): Penalty of default in punctual payment of the instalments of the new decree.

When a Court re-opens a decree in exercise of the powers conferred by the various sub-clauses of sub-section (1), it shall have to conform to the various duties specified in the five clauses, (a) to (e) of this sub-section. When an existing decree is re-opened it ceases to exist and it *also* loses its effect as *res judicata,* and the legal position is that the matter in controversy between the parties remains as unadjudicated upon, obliging the Court to make a *fresh* adjudication in relation thereto. That is, why clause (a) of sub-section (2) requires the Court to pass a *new* decree in the place of the old one which is re-opened. It is necessary that before making a new decree, the Court should give the parties an opportunity to say what they have got to say with respect to the matter. For instance, it may be that the debt in question may not be a loan at all within the meaning of the Act or that the liability in respect of the debt might have altogether been wiped off in consequence of some bankruptcy proceeding or similar other legal incidents. So it is but reasonable that the Court should hear the parties before making a *new* decree. This is, as seen above, in accordance with the rule of equity known as the rule of *audi alteram partem* (*vide* notes at p. 172, *ante*). The new decree should be made in accordance with the provisions of this Act, that is, the higher rates of interest should be scaled down to the limits specified in section 30 and instalments should be allowed in conformity with the provisions of section 34. [Cf. *Purna Chand* v. *Bhagwat Prasad,* I.L.R. (1937) All. 502=A.I.R. 1937 All. 345]. The Court while making a new decree should consider what amount of the old costs can still be awarded to the decree-holder. Although the Court

has a discretion in the matter of awarding costs for the new decree, that, however, does not mean that the Court can altogether ignore the principles embodied in section 35 of the Code of Civil Procedure. Costs generally follow the event. Costs are no doubt in the discretion of the Court, but such discretion should be exercised on legal principles and not by chance medley, nor by caprice, nor in temper ; read Lord Coleridge C.J.'s observation in *Huxley* v. *West London Ex. Ry. & Co.,* (1886) 17 Q.B.D. 373 (376), relied on in *Justain Hull* v. *Arthur Francis Paul,* 24 C.W.N. 352. Comp. *Bengal Stone Co.* v. *Joseph Issac,* 27 C.L.J. 78. The decree-holder is not responsible for the reduction of his claim in the new decree in consequence of alteration of the rate of interest and therefore the costs he has already incurred should not be reduced in proportion to the decretal dues of the new decree, *Gopal Chunder* v. *Bhoobun Mohun,* 30 Cal. 536. That is why the Court has been given a discretion in respect of the costs of the old decree and the Court should see what amount of the costs thrown away should still be reserved for the decree-holder.

Clauses (b) & (c): Rights of third parties.

Clause (b) of sub-section (2), as also **Clause** (c) to some extent protects the rights of strangers *bona fide* acquiring interest in consequence of the execution of the re-opened decree. For example, a third party auction-purchases the property sold in execution of the old decree and if the old decree is replaced by a new decree that will not have the effect of depriving the third party auction-purchaser of the benefit of his auction purchase. If the purchase by a stranger is not a *bona fide* one but is only a collusive transaction or is a mere *benami* purchase on behalf of the decree-holder, the protection afforded by Cl. (b) will not be available. Clause (c) also shows that restoration of property to the judgment-debtor in consequence of the re-opening of the old decree is possible only in the case of a decree-holder auction-purchaser and not in the case of a stranger auction-purchaser. Under clause (c) there is no question of restoration of property, if the decree-holder has not already obtained possession of the property. There is no question of awarding mesne profits, when possession of the property is restored to the judgment-debtor. This is so because there is no question of restoration of possession in relation to a stranger, and in relation to a decree-holder, mesne profits ought not to be awarded against him, because he obtained no other return on his money in the intervening period than the usufruct from the property. An order for restoration under Clause (c) cannot be made unless the decree-holder was in possession of the property on the date on which the decree was re-opened. So if the decree-holder had already transferred the property in favour of a *bona fide* purchaser for value,

before the decree is re-opened, no order for restoration of the property to the judgment-debtor can possibly be made. This rule also accords with the principle of clause (b) which protects the rights of *bona fide* third party purchasers. But where the assignment from the decree-holder has not been effected in good faith but with the object of defeating the operation of the Act, an order of restoration can still be made. If the decree-holder's transferee has himself acted in good faith and not participated in the evil intention of the decree-holder, the position may be different. For the rights of the *bona fide* purchasers, see generally *Mukhoda* v. *Gopal Chandra*, 36 Cal. 622; *Paresh Nath* v. *Hari Charan*, 38 Cal. 622=14 C.L.J. 300=15 C.W.N. 875, cited at p. 173, *ante*, and the other cases cited there.

Clause (d) authorises the Court to give necessary direction for payment of the amount of the new decree in a number of suitable instalments. This clause does not say anything as to the number or duration of the instalments that can be granted in respect of the new decree, but the Court should have regard to the provisions of section 34 in the matter of fixing instalments. The provision of this clause is imperative and the Court cannot make the new decree payable in a lump. If it omits to give directions for payment of the new decree in instalments, the decree will be open to attack on appeal or in revision, as the case may be. As seen at p. 174, *ante*, the instalments under this clause need not be *annual*. Consult *Purna Chand* v. *Bhagwat Prasad*, I.L.R. (1937) All. 502=A.I.R. 1937 A.. 345.

The new decree may be made payable in instalments.

Clause (e) makes it obligatory for the Court to make a direction that in default of payment of any particular instalment on the appointed date the decree-holder will be restored back to possession of the property which he had purchased in execution of the reopened decree but which was taken away from him under clause (c) of sub-section (2). In this case, that is, when the decree-holder is reinstated in his auction purchased property, the purchase money paid by the decree-holder should, however, be set off against the unsatisfied balance of the new decree. It should be noticed that the clause speaks of *the property*, which must mean the property as it was at the time of the auction-purchase; so the borrower will have to answer for all wastes and injuries committed by him in relation to the property during the period of his occupation.

Sub-section (3) : **"Suit to which this Act applies"** : This expression has been defined in section 2 (22), *vide* notes at 38, *ante*. In addition to the meaning assigned to the expression in

the said definition clause, the expression has been given a further extended meaning for the purposes of this section. In this section the expression includes a proceeding started by a creditor either under section 33 of the Provincial Insolvency Act or under section 48 of the Presidency-towns Insolvency Act read with the second Schedule thereof for the purpose of getting the amount of his loan advanced before or after the commencement of this Act, included in the bankruptcy schedule. The effect of this provision is that if a loan whenever contracted is included in a bankruptcy schedule, it will be competent for the Insolvency Court, subject to the 12 years' rule prescribed by clause (i) of the second Proviso, to revise the amount of such loan and to amend it and bring it in conformity with the limits prescribed in section 30 of this Act. As to the Insolvency Court's power to go behind the judgment-debt, see author's *Provincial Insolvency Act,* 3rd Ed., p. 217.

Sub-section (4) : **Form of suit immaterial for the applicability of the section :** If the suit is substantially one for recovery of a loan or for the enforcement of any agreement or security in respect of a loan or for the redemption of any such security, the Court will apply this section although the suit might be defective in form. This rule is in conformity with the dictum of Lord Buckmaster saying that no forms or procedure should ever be permitted to exclude the presentation of a litigant's defence, *Tom Boevey* v. *African Products Ltd.,* A.I.R. 1928 P.C. 261=110 I.C. 299, P.C. It is an elementary rule of law that rules of procedure are not made for the purpose of hindering justice but rather for promoting it, *Manni Lal* v. *Sheobaran,* A.I.R. 1924 Oudh, 389=78 I.C. 157. Therefore, the Court should look more to the substance of the thing than to its form. In consequence of this provision it will be impossible to evade the operation of Act by resort to any subterfuge in relation to the frame of the suit.

Sub-section (5) : **Protection of bona fide assignee for value :** This sub-section is virtually an amplication of the limitation fettering the Courts, power of re-opening transactions, as laid down in clause (b) of sub-section (2) of the section. Any person who has *bona fide* taken an assignment of the loan for a *valuable* consideration is not affected by the provisions of this section, provided no notice *in writing,* as contemplated in section 28 (1) (a), of the fact that the debt is affected by the provisions of this Act has been given to him. If any such *written* notice has been given to him, the assignee has no protection under this section. In order to entitle the assignee to protection hereunder, it is necessary that the assignee must have taken the transfer in *good* faith and for valuable consideration. The protection afforded by this sub-

section will be available irrespective of the question as to whether the assignment has been taken from the original lender or from a *puisne* assignee. The **onus** of proving good faith, consideration and absence of notice is on the assignee, because the section expressly says that it is for the assignee to *satisfy* the Court that these facts exist in the case. The benefit of this sub-section will not be available where the assignment was taken with the object of shielding the lender from the mischief of the section. The good faith contemplated by this sub-section is the good faith on the part of the assignee; the assignor's *mala fides* will not prejudice the assignee if he has not participated in them.

Sub-section (6) : **The powers hereunder can be exercised in proceedings in execution or on review or on appeal :** The powers conferred by sub-sections (1) and (2) of this section may be exercised by the Court which has already made a decree in a suit to which this Act applies, in the two following proceedings (provided such decree was not *fully* satisfied by the 1st of January, 1939)—namely, (i) in the proceedings in execution of such decree and (ii) on an application for review of such decree, *made within one year* of the date of commencement of this Act. Such powers can be exercised also by the Appellate Court before which an appeal in question is pending. The powers which a trial Court or an Appellate Court can exercise hereunder in execution or on review or on appeal (as the case may be), will remain unimpaired notwithstanding any law for the time being in force to the contrary. This has been made clear by the opening reservation, "Notwithstanding anything contained etc." It is only the trial Court making the decree or an appellate Court hearing an appeal from the decree that can exercise the powers contemplated by sub-sction (6) ; no other Court can exercise these powers. For instance, if a regular suit is instituted for setting aside the decree in question on the ground of fraud, the Court before which such a suit has been instituted will have no power to take action under the present sub-section (6).

For the applicability of this sub-section, it is essentially necessary (i) that the decree in question must have been made in a suit to which this Act applies and (ii) that the decree was not fully satisfied on the first day of January, 1939. If the suit in which the decree in question has been made is one to which this Act does not apply, the present sub-section (6) will not enable the Court to exercise any of the powers contemplated in sub-sections (1) and (2) of section 36. The same result will follow even where the suit itself is amenable to this Act but the decree made therein stands *fully* satisfied as on the 1st of January, 1939, only *provisionally,* as

for instance, where the decretal dues were realised before 1st January, 1939, but an appeal from the decree was pending even after that date. The word, "fully" shows that a *partial* or *provisional* satisfaction of the decree will not put the sub-section (6) out of operation. The use of the word "fully" does not justify a contention that sub-section (6) covers only the case of *partial* satisfaction of the decree in question and does not contemplate the case where the decree was not satisfied *at all.* For the purposes of this section, a decree will not be deemed to have been fully satisfied so long as an application for possession of the auction-purchased property by the decree-holder auction-purchaser remains undisposed of, see *Explanation* to sub-section (1) of the section.

Review of Pre-Act Decrees : Under clause (ii) of sub-section 6 (a) provision has been made for review of decrees passed in suits which are amenable to the provisions of this Act. The object of this provision is to extend the benefit of this Act to certain decrees which were made shortly before the present enactment. The decrees were evidently made on the basis of the old law under which the terms as to interest were not so lenient as they are now and the Legislature, in their wisdom, have thought it fit to bring these decrees within the palliative measures of this new Act and provisions have accordingly herein been made conceding a right to reopen the decree by way of review. The grounds of review will be as those specified in O. XLVII, r. 1 or as indicated in *Chajju Ram* v. *Naki,* 49 I.A. 144=36 C.L.J. 459=26 C.W.N. 697, P.C. The decree being on the basis of a liability in excess of the limits specified in section 30 (1) & (2), will be regarded as vitiated by an error on the face of the records and as furnishing a *sufficient cause* for *reviewing* the whole matter. A review under clause (ii) of sub-section 6 (a) is possible only if the decree has been made in a suit to *which this Act applies* [see p. 38, *ante*] and if the decree was not fully satisfied on the 1st of January, 1939. The application for review under the said clause can be made within one year of the date of commencement of this Act [*Vide* p. 9, *ante*] *notwithstanding* the provisions of Articles 161, 162 and 173 (as the case may be) of the First Schedule of the Indian Limitation Act (IX of 1908). In computing this one year the benefit of sections 12, 14 and 18 of the Indian Limitation Act can be availed of, see section 29 (2) (a) of the Limitation Act. As during this long period of one year the personnel of the Judges may change, provision has been made to exclude the operation of rules 2 and 5 of O. xlvii of the Civil Procedure Code which provide that a review application should ordinarily be made to the Judge or Judges who made the decree under review. The exclusion of

The period of such review is one year from the date of commencement of the Act.

rules 2 and 5 of O. xlvii, C. P. Code in express terms, implies that the other rules of the said Order will apply to a review application hereunder by reason of the legal maxim, *expressio unius est exclusio alterius* (the express mention of one is the exclusion of another).

Appellate Court's power of re-opening decrees : Not only the trial Court can re-open a decree made in a suit subject to this Act and standing unsatisfied on 1st January, 1939, but the appellate Court before which some matter in connection with such a decree is pending, also, can re-open the decree and exercise the powers conferred by sub-sections (1) and (2) of this section. The appellate Court *itself* can exercise any of these powers or can make a remand in the manner indicated in O. XLI, r. 25, directing the Court below to take necessary actions in conformity with the provisions of this section. When the appellate Court *itself* exercises the powers hereunder, it evidently proceeds on the basis of its powers under section 107 (2) of the C. P. Code. As working out the provisions of this section might involve investigation of facts and recording of evidence, it will be advisable for an appellate Court to keep the case pending on its file and remit the points for investigation to the Court below, with directions to it to exercise the powers conferred by section 36. The Court below will then ascertain the net resultant reached in consequence of the application of this section and forward its findings along with the whole record to the appellate Court. If any one of the parties is aggrieved by any of the findings of the Court below, he may take exception thereto before the appellate Court in accordance with the provisions of O. XLI, r. 26 of the C. P. Code. Under said rule 26, the appellate Court has to fix a time within which an aggrieved party is to file his objections to the findings of the Court below. Non-fixation of such time by the appellate Court does not make the remand directions bad in law [*Suraj Bali* v. *Dan Bahadur,* 1 O.L.J. 681=26 I.C. 736 (737)] and if no time is fixed for filing the objections, they may be filed at any time before the appeal comes up for actual hearing [*Kirat Chand* v. *Madan Mohan,* 1884 A.W.N. 158].

Prohibition of execution of decrees by arrest and detention in prison.

37. Notwithstanding anything contained in any law for the time being in force, no Court shall order execution of a decree passed in any suit to which this Act applies by arrest and detention in prison of the judgment-debtor.

Prohibition of Execution of decree by arrest and detention in prison : The effect of this section is to render it impossible for a decree-holder to execute his decree for money by arrest and detention of the judgment-debtor in civil prison, which the Legislature has considered to be "undesirable tools in the hands of oppressive money-lenders". Provisions for execution of decrees by arrest and detention in prison will be found in sections 51, 55-59 and O. XXI, rr. 37, 40. Some of these provisions have been amended by Act XXI of 1936, by which the power of arrest and detention has been circumscribed by a number of conditions and limitations. This section proposes to take away even the residue of power left by the said Amending Act XXI of 1936 in relation to the decrees passed in a *suit to which this Act applies*. The opening words of the section mean that the prohibition of this section is absolute and cannot be whittled away by recourse to the provisions of the C. P. Code. That the prohibition of the section is absolute and imperative will appear from the use of the word "shall" in the section. An order of arrest in contravention of the section is null and void.

The prohibition of the section applies in relation to the decrees passed in a suit to which this Act applies. As to to which suits this Act applies, see section 2 (22), as also the *Explanation* to the proviso of section 36 (1).

Judgment-debtors in detention on the date of operation of Act should be immediately released : Detention in prison is continued execution of the decree and, therefore, the present Act will, by reason of section 2 (22) of the Act, apply to every case in which the Judgment-debtor is under detention in civil jail in execution of a decree. Detention being altogether prohibited, the moment this Act is put in operation, the judgment-debtor, if under detention, has to be released forthwith, otherwise it will be levying execution in contravention of the provisions of this section.

No malicious prosecution for causing arrest or detention before the operation of the Act: Although the provisions of the Act operate retrospectively and under section 30 (2) the debtor *is deemed* to have always been liable only for the lower rates of interest fixed by this Act, still this will not mean that if the creditor had caused arrest and detention before the commencement of operation of this Act on account of a liability which subsequently transpires to be only an "excess liability" within the meaning of section 36 (1) (c), he will not, thereby, render himself liable to damages on that account. The creditor, at the time when he caused the arrest, acted in good faith and this good faith will not become converted into, and take effect as, bad faith in consequence of the operation of a subsequent legislation.

Inquiry for taking accounts and declaring the amount due.

38. (1) Any borrower may make an application at any time to a Court which would have jurisdiction to entertain a suit by the lender for the recovery of the principal and interest of a loan made before or after the commencement of this Act for taking accounts and for declaring the amount due to the lender. Such application shall be in the prescribed form and shall be accompanied by a fee of one rupee, and on receipt of such application, the Court shall cause a notice thereof to be served on the lender.

(2) The Court shall thereafter take an account of the transactions between the parties and shall declare the amounts, if any,—

(*a*) payable and already due,

(*b*) payable but not yet due

by the borrower to the lender, whether as principal or interest or both. In taking accounts under this section the Court shall follow the same procedure as it does in regard to civil suits and, so far as may be, the provisions of Chapters IV, VI and VII.

(3) A proceeding under this section shall be deemed to be a suit for the purposes of section 11 of the Code of Civil Procedure, 1908, and a declaration under this section shall be subject to appeal, if any, as if it were a decree of the Court, and every decision in appeal shall be subject to appeal to the High Court in the same manner as a decree passed in appeal.

Inquiry for taking accounts and ascertainment of the due amount : This section makes provision for an enquiry being held as to what amount is due in respect of a loan. Such an enquiry has to be started on an application by the borrower. For the meaning of the term *borrower* see section 2 (2), *ante*. Under that section a "borrower" includes his successor-in-interest or his surety. Therefore, the surety is entitled to the benefit of the section, and if the borrower is dead, his legal representatives, or his executors, administrators and trustees etc. can avail themselves of the benefit of this section. The application must necessarily be in writing It may be made *at any time,* that is, there is no time-

limit for the making of such an application. Although, there is no time-limit for the making of an application under this section, still it is apparent that such an application can be made only during the subsistence of the loan, that is, before the entire amount of the principal and interest has been fully paid up, because, when a loan is fully paid up, the borrower ceases to exist, *vide* notes at p. 17, *ante*. The application is to be presented to the Court which would have jurisdiction to entertain a suit for recovery of the loan in question. The venue of such Court is determined under sec. 20 of the C. P. Code, with reference to the defendant's residence or place of business or with reference to the place where the loan is incurred or the place fixed for repayment, consult the following cases: *Srinarain* v. *Jagannath,* 15 A.L.J. 653=41 I.C. 890; *Sailendra Nath* v. *Ram Sundar,* 16 C.L.J. 279=15 I.C. 885; *Chiranji Lal* v. *Jitmal,* 96 P.L.R. 1909=4 I.C. 977; *Palaniappa Chettyar* v. *Subbiah Chettyar,* A.I.R. 1937 Rang. 433; *Nathubhai* v. *Chhabildas,* 59 Bom. 365=A.I.R. 1935 Bom. 283=157 I.C. 248; *Bansilal* v. *Ghulam,* 53 I.A. 58=53 Cal. 88=43 C.L.J. 1=30 C.W.N. 577=A.I.R. 1925 P.C. 290=92 I.C. 760 [Place of repayment and defendant's residence determines the venue of Court, in preference to the place of loan]; *Briju Pandey* v. *Gangu Ahir,* A.I.R. 1939 Pat. 294 [Place of suing is the place of contract]. Cf. *Beni Madha Sikdar* v. *Sarat Chandra,* A.I.R. 1937 Cal. 643=176 I.C. 221; *Samarendra Nath* v. *Pyaree Charan,* 61 Cal. 1023=39 C.W.N. 293=A.I.R. 1935 Cal. 160=155 I.C. 882. In some cases the Courts have decided this question with reference to the legal maxim, "the debtor shall find out his creditor and pay at the creditor's place," *Suryanarayan* v. *Viswanatha,* A.I.R. 1926 Mad. 1207=97 I.C. 1027; *Fazal Din* v. *Ghulam Mustafa,* 32 P.L.R. 737=131 I.C. 303.

Which Court has jurisdiction to entertain a suit for recovery of loan.

The use of the general term "lender" in the section implies that a borrower of both *money* and *goods* is entitled to proceed under this section. Of course, the words, "*amount* due to the lender" seem to indicate that the section is limited to the case of a *money-borrower*. But it may be stated that at many places in the Act the Legislature has referred to both *money*-lending and *kind*-lending by use of terms which are more appropriate in relation to money, than in relation to *goods*. For instance, it has been pointed out on several occasions under section 2, *ante* that the Legislature has used the terms "amount", "payable", "sum" etc. without at all referring to the corresponding terms in relation to goods, *e.g.* "quantity", "deliverable", etc. although both kinds of lending were in the contemplation of the Legislature on all those occasions.

The section applies to all loans made whether before or after the commencement of this Act.

An enquiry for accounts under this section is to be started by means of an *application* and not by the presentation of a *plaint* as under sec. 33 of the U. P. Agriculturist's Relief Act, 1934, which specifically contemplates a *suit*. The proceeding being started on an application can terminate only in an *order* and not in a *decree*, see sec. 2 of the C. P. Code. The proceeding, however, for the purposes of sub-sec. (3), *will be deemed* to be a suit.

The **relief** to which the applicant hereunder is entitled is two-fold : (1) taking of accounts and (2) a declaration that a certain amount only is due to the lender, the amount being ascertained on examination of the accounts.

Procedure for the application.

The application contemplared by the section is to be in the prescribed form, that is, in the form to be prescribed by the rules to be framed under the Act, see section 2 (15), *ante*. The Court fee payable on the application is Re. 1/-. On receipt of the application, the Court is to cause a notice of the application to be served on the lender. Service of the notice has to be effected in accordance with the provisions of Or. V of the Code of Civil Procedure, 1908. The Court shall then proceed to take accounts between the parties and in doing so the Court shall adopt the very same procedure as it does in regard to civil suits ; this means that the provisions of the Civil Procedure Code will be followed so far as practicable or necessary. Therefore, for the purposes of this section it will be quite permissible for the Court to utilise the provisions of O. XXVI, rr. 11-12, read with section 75 (c) of the C. P. Code and appoint a commissioner to take accounts. In taking accounts the Court or the commissioner should not lose sight of the provisions of Chapters IV, VI and VII of this Act which have dealt with the system of keeping accounts and fixed the limits of realisable interest and made other cognate provisions.

Form of the order hereunder.

After accounts have been taken, if it appears that there is a balance of dues, *in præsenti* or *futuro* in favour of the lender, it shall record an order making a declaration to the following effect, *viz.* (1) so much money is *payable* by borrower to the lender in respect of the loan and has *already become due,* and (2) so much money is *payable* by the borrower to he lender *but that has not yet become* due. This has been clearly provided for in sub-section (2). A sum may be payable and yet not due forthwith, because the parties might have agreed that the debt will not become due till a certain appointed date, commonly called the *due date*.

A proceeding under this section, although a miscellaneous proceeding started on an application, will be deemed to be a suit for the purposes of section 11 of the C. P. Code, that is, an order made under sub-section (2) will have the effect of *res judicata*, so that no party will be entitled to re-open in any subsequent proceeding the amount of debt ascertained by the Court under this section. Not only the proceeding has been placed on the footing of a suit for the purposes of section 11 of the C. P. Code, but the order made under sub-section (2) has been rendered a decree for the purposes of sections 96 and 100 of the C. P. Code and made open to a first and a second appeal respectively under the said sections. A second appeal under sub-section (3) of this section is maintainable only on the ground that the decision is contrary to law or to some usage having the force of law or that some material issue has been left undecided or that the findings of the lower appellate Court are vitiated by some substantial error or defect in the procedure adopted by the Court. *Vide* section 100 of the C. P. Code. A decision under this section being open to an appeal and a second appeal, no question of revision under section 115 C. P. Code in relation to it arises at all, *Nafar Chandra* v. *Kalipada Das*, 44 C.W.N. 364 ; of course, there is also an opinion the other way to the effect that because of the word "thereto" in section 115 of the C. P. Code, the mere fact that an appeal lies to the District Court does not oust the application of said section 115, *Sashi Kanta* v. *Nasirabad Loan Office*, 63 C.L.J. 105. Read also Rau J.'s judgment in 44 C.W.N. 364, *supra*.

A decision under this section is *res judicata*.

Small Causes Courts : Suits for recovery of money on account of unsecured loans up to certain values are small causes both under the Presidency Small Cause Courts Act, 1882, and the Provincial Small Cause Courts Acts, 1887 and section 16 of the latter Act has provided that "save as expressly provided by this Act or by any other enactment for the time being in force a suit cognisable by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable". Therefore, in a great majority of cases (within Small Causes Courts limits) proceedings for inquiry for taking accounts under this section have to be taken in Courts of Small Causes. Although the provisions relating to issue of commissions for examination of accounts as contained in Order xxvi, rules 11-12 of the Civil Procedure Code do not apply to Small Cause Courts [See Orders L and LI of the Code], still by virtue of sub-sec. (2) of this section when an enquiry for accounts is started in a Small Cause Court, such Court will have power to issue commission for the said purpose.

When the proceeding for enquiry into the accounts is started in a Court of Small Causes, the appeal provisions contained in sub-section (3) of this section will not apply. The words "if any" in sub-sec. (3) hereof imply that an appeal here-under will be possible only in those cases in which appeals are otherwise possible. Therefore, a declaration ascertaining liability of a borrower under this section when made by a Court of Small Causes, will not be open to any appeal. The provision of sec. 102 of the Civil Procedure Code restricting appeals in cases of values not exceeding Rs. 500/- also will apply.

A proceeding under this section is not necessarily a *summary* proceeding as the ordinary procedure of civil suits applies to it. Therefore, a declaration of liability made by a Small Cause Court will not go out of the rule of *res judicata* as enacted in section 11 of the Civil Procedure Code on the ground of a question of *competency* of Courts (*vide* said section 11).

Court fees in appeals : will be regulated by Art. 11, clause a (ii) [for Civil Courts] and clause (c) [for High Courts] of Schedule II of the Court Fees Act and will respectively be Re. 1/- and Rs. 5/-.

Deposit in Court of money due to lender.

39. (1) Where any sum of money has been declared under sub-section (2) of section 38 to be payable by the borrower to the lender as principal or interest or both, or where a borrower has sent to a lender by postal money order any sum of money due from him to the lender in respect of a loan and the lender has refused to accept the same, the borrower may apply in the prescribed manner to the Civil Court of the lowest grade having jurisdiction over the place where he resides for permission to deposit the said sum in Court to the account of the lender, and the Court shall keep the said sum in deposit.

(2) The Court shall thereupon cause notice of the deposit to be served on the lender, and the lender may on presenting a petition, verified as for a plaint and stating the sum then due in respect of the loan and his willingness to accept the money so deposited, receive the sum:

Provided that in accepting any sum deposited under this section, a lender shall not be bound by any

statement made by the borrower in depositing the same:

Provided also that, if the Court is satisfied that the lender has, without reasonable excuse, refused to accept any sum sent to him by postal money-order by the borrower in respect of the loan, it may direct the payment to the borrower, from the money so deposited or otherwise, of such sum as damages and costs as it thinks fit.

(3) Notwithstanding any agreement between the parties, when the borrower has deposited in Court under this section any sum due in respect of the loan, if such sum is in payment of the principal or any part thereof, the interest on such principal or part shall cease from the date of the service of notice on the lender under sub-section (2).

(4) Nothing in this section shall affect the operation of sections 83 and 84 of the Transfer of Property Act, 1882, in regard to loans to which those sections apply.

Deposit in Court of money due to lender : When accounts are taken between the parties in conformity with the provisions of section 38, *ante,* and a declaration is made under sub-section (2) of the said section that a certain amount is due from the borrower to the lender in respect of the principal or interest or both of the loan between them, or where a borrower has remitted to the lender by *postal* money-order a sum which, according to his own calculation, he considers to be due in respect of the loan but the lender has refused to accept the same, the best course open to him will be to deposit the amount due on either of the two aforesaid bases in Court. Such deposit is to be made along with an *application* in accordance with rules to be framed under section 44 (p. 201), *post.* The application is to be presented to the Civil Court of the lowest grade [Comp. section 15 of the C. P. Code] having jurisdiction over the place where he resides and is to embody a prayer that necessary permission might be given to him to make the deposit as aforesaid *to the account of the lender.* Where such a prayer has been made the Court shall accept the deposit. The obligation of the Court to accept the deposit is rather imperative. This has been made clear by the use of the word *'shall'.* The provision of this section is akin to those of Bengal Regulation I of 1778, In proceedings for deposit under that Regulation, the

functions of the Court were more or less ministerial in character [*Forbes* v. *Ameeroonissa Begum*, 10 M.I.A. 340]. The position under this present section is not very much different except this that under the second Proviso the Court may have to assume judicial function [notice the expression "if satisfied"] in the matter of awarding damages and costs to the borrower in the contingency referred to in that proviso.

Sub-section (2) provides for the service of the notice of the deposit on the lender. Such service shall evidently be effected according to the provisions of Order V of the Code of Civil Procedure. The lender on receipt of the notice of deposit will be entitled to present an application, *verified in the manner* of a plaint [See O. VI, r. 15 of the C. P. Code]. In this application the lender is to state what sum, according to his own calculation, is due to him in respect of the loan. The application should state that the lender is *willing* to accept the money in deposit in Court. If these formalities are complied with, the Court will make an order directing payment of the deposit money to the lender. As to the sufficiency or otherwise of verification, see *R. S. N. Co.* v. *Khanta Kumari*, 59 C.L.J. 391=38 C.W.N. 551. If the verification is false, the person verifying becomes liable to a prosecution under section 191 of the Indian Penal Code, *Re Attorney*, 41 Cal. 113=19 I.C. 993.

The *proviso* to sub-section lays down what may be called a Rule *against* Estoppel. The effect of acceptance of the deposit money under sub-section (1) is *not* to bind the lender by any statement made by the borrower in his application filed along with the deposit.

Cessation of interest upon deposit.

When a deposit is made under this section, the legal effect is that the interest will stop to run from the date of service of the notice of the deposit on the lender; of course, this will be so only if the principal sum of the loan is covered by the deposit. If the deposit covers only a part of the principal sum, cessation of interest will be only in respect of that part. That part of the principal amount which is not covered by the deposit will, however, continue to carry interest. Notice that the interest ceases to run from the date of service of notice of deposit on the lender and not from the date of the deposit; this is just to penalise the lender's obstructive policy or his recusancy. The rule of cessation of interest enacted in sub-section (3) cannot be defeated by any agreement to the contrary between the parties. This is clear from the opening words of sub-section (3), *viz.*, "Notwithstanding any agreement between the parties." In relation to mortgage debts, however, by reason of sub-sec. (4) hereof section 84 of the T. P. Act operates

and under that section a stipulation for previous notice as a condition precedent for cessation of interest is valid and therefore the limitation, *viz.* "Notwithstanding any agreement etc." has no force in relation to mortgage debts.

Sub-section (4) makes a *saving* provision in respect of sections 83 and 84 of the Transfer of Property Act. Section 83 of the T. P. Act authorises the mortgagor to deposit in Court the money due on a mortgage and section 84 of that Act makes provision for cessation of interest upon such deposit being made. The rules of sections 83 and 84 of the T. P. Act are different in certain particulars from that of this section. The effect of this sub-section (4) is that the provision of the said sections 83 and 84 stand unaffected by section 39 of this Act and therefore deposits in relation to mortgages still continue to be governed by those sections. For the legal position under the said sections of the T. P. Act, *vide* author's *Transfer of Property Act,* pp. 567-584. In respect of the unsecured loans, deposits have to be made under this section.

Court fees on the application : The word "apply" in sub-sec. (1) necessitates the presentation of an application along with the deposit. Such application is to bear a Court fee stamp of -/12/- annas as required by Art. 1 (b) of Schedule II of the Court fees Act.

Limitation for Lender's application for withdrawal of deposit money : There is no time-limit for such an application. Sub-section (1) of the section in explicit terms says that the deposit should be made *to the account of the lender.* A person can come to Court to draw out the money which the Court still holds on his account *at any time* without being affected by any bar of limitation, *Apurba Krishna* v. *Chundermoney,* 10 C.W.N. 354 at p. 360. Comp. *Muhammad Sulaiman* v. *Muhammad Yar Khan,* 11 All. 267 (F.B.) at p. 291. It is quite possible to get hold of decisions lending support to the view that the three years' rule prescribed by Art. 181 of the Indian Limitation Act governs such an application. We need not discuss these decisions in extenso as they are all based on an ill-appreciation of said Art. 181. This Article 181 is restricted in its operation to applications under the Civil Procedure Code, 1908, [See *Shri Prakash Singh* v. *Allahabad Bank,* 56 I.A. 30=3 Luck. 684=33 C.W.N. 267=A.I.R. 1929 P.C. 19=114 I.C. 581 (P.C.) ; *Hansraj Gupta* v. *Official Liquidators of the Dehra Dun-Mussorie Tram Co.,* 60 I.A. 13=54 All. 1067=57 C.L.J. 166=37 C.W.N. 379=A.I.R. 1933 P.C. 63=142 I.C. 7, P.C.] and has nothing to do with applications under the special statutes. For further discussions on this matter, read the notes under the heading "Limitation" at p. 287 of author's *Bengal Tenancy Act,* 2nd, Ed. (1936).

Entry of an amount in a bond, etc., different to the amount actually lent to be an offence.

40. (1) No lender shall take from a borrower or intending borrower any note, promise to pay, power of attorney, bond or security which does not state the actual amount of the loan, the rate of interest charged and the time, if any, within which the principal is stipulated to be repaid in full, or which states any of such particulars incorrectly, nor shall he take from any borrower or intending borrower any instrument in which any entry is left blank for completion at a later date.

(2) Whoever intentionally contravenes the provisions of sub-section (1) shall, on conviction, be punishable with simple imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both.

(3) No money-lender shall take from any borrower or intending borrower any note, promise to pay, power of attorney, bond or security which describes or refers to as a commercial loan any loan which is not a commercial loan.

(4) Notwithstanding anything contained in any law for the time being in force, any note, promise to pay, power of attorney, bond, security or document referred to in sub-section (1) or sub-section (3) shall be void and unenforceable.

(5) Nothwithstanding anything contained in any law for the time being in force, in any suit, or proceeding the burden of proving that a loan is a commercial loan shall be on the money-lender who advanced the loan.

Sub-sections (1) & (2) : **Penalty for wrong entry as to amount of loan etc.:** If the amount of a loan, or the rate of interest or the time for repayment is wrongly stated in any note, promissory note or bond, or any other instrument of loan or if blank spaces are left in any one of such documents with the intention of coveniently filling them up, it will be an offence, so far as the lender is concerned, punishable with simple imprisonment for a period extending up to six months or with fine up to Rs. 1,000,

or with both. The prohibition of the section affects the lender and not the borrower or an intending borrower. That is, the lender *taking* a document with such wrong entries or blank spaces commits an offence, but the borrower or the intending borrower executing the document does not. The offence contemplated by the section is committed as soon as the documents with wrong entries or blank spaces are *taken* from the borrower or the intending borrower and not when they are sought to be enforced. Contravention of the prohibition of sub-section (1) should be *intentional,* otherwise no offence is committed hereunder. This has been made clear by sub-section (2). In an English case, the amount of loan was mentioned through a mistake of the typist as £140 instead of the actual amount of £100 [see *Dunn Trust* v. *Feetham,* (1936) 1 K.B. 22=105 L.J. (K.B.) 52] ; such a case would not come within the perils of this section, as the misstatement was not intentional. The lender committing an offence hereunder can be *convicted* by a Criminal Court and the sentence to be inflicted on him may consist of a *simple* imprisonment for a period up to six months or with a fine which may extend to Rs. 1,000/- or with both. The words "on conviction", "punishable" etc. show that the offence contemplated by the section is a criminal offence and is, therefore to be tried as such. The section holds out no indication as to by which class of Criminal Courts they are to be tried and therefore under section 29 (2) of the Cr. P. Code read with the last entry in Schedule II of the Code, they are triable by "any Magistrate."

In addition to the penalty prescribed by sub-section (2), the instruments of loan which contravene sub-section (1) are subject to a further restriction. They have been declared void and unenforceable by sub-section (4). Notice that sub-section (1) uses the general word "lender" as against the word "money-lender" in sub-section (3). Therefore, this sub-section equally applies to a money-lender and a kind-lender, read the notes under the heading "Lender" at p. 26, *ante*.

Sub-section (3) : **Prohibition regarding the description of a non-commercial loan as a commercial loan :** This sub-section prohibits a *money-lender* from taking from the borrower or any intending borrower, any instrument of loan in which a non-commercial loan is described as a commercial loan. A commercial loan is not subject to the provisions of this Act and therefore many a money-lender may possibly seek to steer clear of the strigent provisions of this Act by describing a non-commercial loan as a commercial loan and the present sub-section is intended to prevent any such circumvention of the law. The prohibition of this sub-section, however does not impose any criminal

liability as that of sub-section (1) does. The utmost penalty entailed by this prohibition is that prescribed by sub-section (4), below. That **sub-section** (4) simply declares the offending instrument of loan to be altogether *void* and *unenforceable*, with the consequence that by attempting to circumvent the law the money-lender forfeits his right to recover the amount of his loan, and in that way ultimately loses his money. A document which is void by reason of the prohibition of this section cannot form a *valid* consideration for a fresh promise to pay or a fresh contract. Any attempt to convert a loan declared void under this section into a valid consideration for any subsequent transaction will be hit by section 23 of the Indian Contract Act. The wordings of sub-section (4) are not happy, because the sub-section only renders certain instruments void and unenforceable, but do not say anything as to what will happen to the loans secured by these documents. It is well known that the Equity Courts of this country have drawn a line of demarcation between a cause of action on a *note* and that on the *original consideration* and allowed claims on the latter cause of action even where the the corresponding notes have failed for certain reasons or other. See the following cases; *Indra Chandra Bag* v. *Hiralal Rong*, 62 C.L.J. 545=40 C.W.N. 696; *Mahatabuddin Mia* v. *Mahammad Najir Joddar*, 40 C.W.N. 473; *East Bengal Commercial Bank* v. *Surendra Narayan Shaha*, 39 C.W.N. 1235. Although the refinement of the legal conception reached in this set of cases has not very much appealed to the ordinary intelligence which more readily appreciated the dictum of Rankin J. (as he then was) in *Dula Meah* v. *Maulvi Abdul Rahaman*, 28 C.W.N. 70=A.I.R. 1924 Cal. 452=81 I.C. 641, to the effect—"verbal negotiations leading up to an express contract in writing cannot be set up as an independent contract and are not even admissible in evidence", still the fact remains that there is a large body of authorities to divorce the original consideration from the failing documents and the Legislature in wording this section should have evinced their cognisance of this state of the law and moulded their phraseologies accordingly. Any how, if we are to impute intelligence to the Legislature, which we are bound to do, there will be no escape from the conclusion that the Legislature intended that contravention of the section must entail loss of the lender's money and he must not be allowed to save his position by invoking the doctrine of *original consideration*—a doctrine which we can scarcely grasp and appreciate, but which we are bound to accept as a *starre decisis*.

Sub-section (5) : **Burden of proving that a loan is a commercial loan is on the money-lender :** This sub-section

lays down a rule regarding the burden of proof in relation to the question whether a loan is a commercial loan or not. It says that in a suit or proceeding the burden of proving that a loan is a commercial loan is on the money-lender advancing the money. This rule is in conformity with sections 101 & 102 of the Indian Evidence Act. In view of the existence of those sections, the present sub-section is simply superfluous and the framers of this Act have unnecessarily over-burdened the Statute Book by inserting it here.

When a loan has been granted orally, and the lender wants to get out of this Act by pleading that it is a commercial loan, the burden of proof (under sec. 101 of the Indian Evidence Act) of the fact that the loan is a commercial one would be upon the lender himself, even if this sub-sec. (5) had not been enacted. If such a loan is evidenced by a document, then under sec. 91 of the Indian Evidence Act the written document itself would be the proper evidence of the transaction and the recitals would be binding upon the parties thereto, at least as admissions, if not as the *terms* of a contract. So where the instrument of a loan recites that its purposes are commercial, the borrower will ordinarily be bound by his statements, although it will be open to him to adduce oral evidence under Explanation 3 of sec. 91 to prove that the real nature of the loan was other than commercial. Notice that mere mention of the loan as commercial in the instrument of loan is not a *term* of the contract referred to in sec. 91 of the Evidence Act and therefore Explanation 3 of that section operates. The present sub-sec. 5 (of this Act) makes a deparature from the provisions of said section 91 and follows the simple rule of onus of proof enacted in secs. 101 and 102 of the said Act and that is why this sub-section opens with the reservation, "Notwithstanding anything contained etc".

Penalty for molestation.

41. (1) Whoever molests, or abets the molestation of, a debtor for the purpose of recovering or attempting to recover, a debt shall be punishable, on conviction, with imprisonment which may extend to one year or with fine which may extend to one thousand rupees or with both.

Explanation.—For the purposes of this section, a person who, with intent to cause another person to abstain from doing any act which he has a right

to do or to do any act which he has a right to abstain from doing,—

(*a*) obstructs or uses violence to or intimidates such other person, or

(*b*) persistently follows such other person from place to place or interferes with any property owned or used by him or deprives him of, or hinders him in the use thereof, or

(*c*) loiters or does any similar act at or near a house, building or place where such other person resides or works or receives his pay or wages or carries on business or happens to be—

shall be deemed to molest such other person:

Provided that a person who attends at or near such house, building or place for the purpose only of making a formal demand for repayment of a loan due or of obtaining or communicating information shall not be deemed to molest.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence under this section shall be cognisable and bailable.

(3) Nothing in this section shall be deemed to restrict the provisions of the Bengal Workmen's Protection Act, 1934.

Analogous Law : This section is very much similar to sec. 3 of the Central Provinces Protection of Debtors Act, 1937.

Molestation or abetment of molestation of a debtor is an offence : Molestation of a debtor or abetment thereof have been declared to constitute offences under this Act. A person guilty of such offences may be convicted and sentenced to an imprisonment for a period up to one year or to payment of a fine extending to Rs. 1,000 or to both. The object of molestation of a debtor or abetment thereof should be to recover or to attempt to recover a debt, otherwise there is no offence. Where owing to the annoyance caused by a debtor in asking the creditor to go to a Civil Court for his money, the creditor resorts to violence against the debtor, he does so not to compel payment but only as a punishment for his impertinence, and as such, such an act will not fall within the

scope of the section. Cf. *Laxman Namdeo* v. *Emperor,* A.I.R. 1939 Nag. 281=185 I.C. 893. Many employers dismiss their employees as soon as notices of attachment of the pay of these employees reach the employers' offices, with the result that the creditors of these unfortunate employees, upon threat of attaching their pay, subject them to various forms of molestations, and the employees for fear of losing their jobs submit to them. In such cases, the employers virtually abet the molestation, but they are not indictable hereunder as they are not actuated by any motive to aid recovery of any debt, although their conduct leads to that result. Of course, in such a case, it may be argued that every man is to be presumed to have *intended* the inevitable consequences or results of his acts, and in that way the office-masters or employers under the aforesaid circumstances may be regarded as having been tainted with an element of *intention* and indictable hereunder on a charge of abetment. Non-mention of the character of the imprisonment in the section renders the offender liable to imprisonment of both the descriptions, simple and rigorous. The offence being punishable with imprisonment of one year is triable by a Court of Session, Presidency Magistrate or Magistrate of the first or second class, see the last but one item in the Schedule II of the Criminal Procedure Code read with section 29 (2) of that Code. The word "whoever" shows that the offences contemplated by the section admit of commission not only by the lender himself, but also by other persons whether acting on behalf of, or for the benefit of, or at the instance of, or even independently of, the lender, provided the purpose of recovering, or attempt to recover, the debt, is there. Although the offender may be a person other than the lender, still the person offended against must be the debtor only and not any other person and not even a member of the debtor's family.

The **Explanation** to the section shows what is meant by *Molestation* in this section. The three clauses appended to the *Explanation* specify the various acts which will constitute an offence hereunder. These are (a) obstruction to, use of violence towards, or intimidation of, the debtor, (b) or persistently following the debtor from place to place or interfering with the debtor's property or with his enjoyment thereof, (c) or loitering in the neighbourhood of the debtor's residence or his place of business or service or work and so on. In preparing a list of the tabooed acts the draftsman of the Act must evidently have envisaged to himself the normal activities of a Kabuli money-lender in relation to his debtor. All these acts will not constitute molestation unless they were prompted by an intention to compel the debtor to do something which he ought not to have done or to abstain from

doing something which he should have done, *vide supra.* The **proviso** to the Explanation is somewhat important inasmuch as it saves an innocent calling at the debtor's place for the purpose of making a formal demand for repayment of a loan or interchanging necessary informations, from the opprobrium of a criminal offence. Compare this section with a somewhat similar provision contained in section 3 of the Bengal Workmen's Protection Act, 1934 (Beng. Act IV of 1935) in which also the word "loiters" occurs. This proviso has no application in the localities which are within the purview of the said Act : *vide* notes under sub-section (3), *post.* In construing whether an act constitutes an offence hereunder, it should be borne in mind that where a statute is susceptible of two readings, that version must be chosen which abridges the new list of misdemeanours rather than that which multiplies it, see *Verner Jeffreys* v. *Pinto,* (1929) 1 Ch. 401.

Sub-section (2) : **Offence hereunder is cognisable and bailable :** Under the last but one item of the second Schedule of the Criminal Procedure Code, 1898, an offence punishable under a special statute with imprisonment for 1 year and upwards is non-cognisable and bailable, so that a warrant is necessary for arrest of the offender [see section 4 (1) (f) of the Cr. P. Code], but having regard to the gravity of the offence contemplated herein, the Legislature has made it cognisable, so that a police-officer may arrest without a warrant ; thus, this sub-section supersedes the Cr. P. Code in this respect ; that is, why the apologetic prelude "Notwithstanding. . . .1898" has become necessary for this sub-section (2). As to the meaning of the term "bailable offence", see section 4 (1) (b) of the Cr. P. Code. Compare the provisions of this sub-section with those of section 4 of the Bengal Workmen's Protection Act, 1934 (Beng. Act IV of 1935).

Sub-section (3) : **Saving regarding Bengal Workmen's Protection Act :** This Bengal Act (No. IV of 1935) has been passed with the object of preventing recovery of debts from certain classes of workmen by besetting their place of work. It is limited in its operation to the town of Calcutta and the districts of 24 Pargannas, Hooghly and Howrah. The people outside these places are not interested in the Act. Section 3 of this Act prohibits and penalises loitering near mines, docks, wharfs, jetties, Railway stations or railway yards, or factories with a view to recovering debts from the workmen of those places, and contains no proviso (as occurs in the present section) permitting visitation of those places for the purpose of making a formal demand of repayment or of mutual communication of informations. Therefore, in the districts in which the Bengal Workmen's Protection Act, 1934 (Act IV of 1935) is in force, it is not possible for the lenders

even to enter the areas of mines,, docks, wharfs, jetties, factories Railway stations or yards etc. for the purpose of making formal demands of repayment or of holding communications with their debtors who are employed as workmen in those places. The effect of this section is not, by virtue of the proviso to the Explanation attached to its first sub-section, to authorise such formal demands or interchange of communications in derogation of the stringent provisions of the aforesaid Bengal Act of 1934. This has been made clear by the saving provision of this sub-section (3).

General provisions regarding penalties.

42. (1) When any money-lender or any servant or agent of, or any person responsible for the management of the money-lending business of, a money-lender knowingly and wilfully commits, authorises or permits any default in complying with, or any contravention of, any provision of this Act, if the money-lender or such servant, agent or person is—

(*a*) an individual, such individual, or

(*b*) an undivided Hindu joint family, any member of such family who is knowingly and wilfully a party to such default or contravention, or

(*c*) a body corporate, any director or officer of such body who is knowingly and wilfully a party to such default or contravention, or

(*d*) an unincorporated body, any member of such body who is knowingly and wilfully a party to such default or contravention,

shall, where a specific penalty has been provided in this Act, be punishable under the provisions of this Act providing such penalty, and where no such specific penalty has been provided, be punishable on conviction——

(*i*) for the first offence, with fine which may extend to two hundred rupees,

(*ii*) for the second offence, with fine which may extend to five hundred rupees, and

(*iii*) for any subsequent offence, with rigorous imprisonment which may extend to three months and shall also be liable to fine.

(2) No Court shall take cognizance of an offence punishable under sub-section (1) except on the complaint in writing of the Provincial Registrar or a Registrar or of a person authorised in this behalf by the Provincial Registrar or a Registrar.

(3) The Provincial Registrar may order the withdrawal of a complaint made under sub-section (2), and, if he does so, shall forward a copy of such order to the Court, and upon receipt thereof by the Court, no further proceedings shall be taken on the complaint.

(4) No Court inferior to that of a Presidency Magistrate or a Sub-divisional Magistrate, or a Magistrate of the first class shall try an offence punishable under sub-section (1).

General Provisions regarding Penalties : Some of the sections of this Act (e.g. section 23, section 28 and section 41) have penalised certain specific kinds of contravention of the provisions of this Act or disregard of some specific prohibitions contained herein, and provisions have been made in this section in a *general way* that when a specific penalty has been provided for any particular kind of contravention or disregard of the law, then in the particular class of cases of such contravention and disregard, that specific penalty will be enforced and in the absence of any such specific penalty, the general penalty provision of this section will apply to all other cases of contravention or disregard of the provisions of this Act. This is in accordance with the general principle of law that where a special offence is created by a statute and also a special penalty is prescribed therein, that particular penalty and no other should be imposed for such an offence, read *A. T. Ganguly* v. *Watson,* 53 Cal. 929=44 C.L.J. 350=98 I.C. 116—referring to *Queen* v. *Cubitt,* (1889) 22 Q.B.D. 622. If the money-lender *knowingly* and *wilfully* himself contravenes, or fails to comply with, any provision of this Act, he commits an offence hereunder. He commits an offence hereunder also where he *knowingly* and *wilfully* authorises or permits non-compliance with or contravention of any of the provisions of the Act. Thus, actual commissions and omissions, or abetment of such commissions or

omissions are all offences under this section ; but in every case of commission or omission contemplated by this section, the money-lender's act or default must be a conscious or a wilful one. Absence of these two elements of self-consciousness and volition, make the act or default innocent and inoffensive. The word, "and" between "knowingly" and "wilfully" shows that both the elements of *knowledge* and *volition* should be present to give rise to an offence : *vide* notes under the next heading. Now, the money-lender may be an individual, or an undivided Hindu family or a corporate or an unincorporated body ; so detailed provisions have been made in the several clauses of sub-section (1) declaring which persons in all these diverse cases will be regarded as the actual offender liable to be hauled up before the Criminal Court. Clause (a) provides for the case where the money-lender is an individual. This case presents no difficulty in the matter of fixation of criminal liability for contravention of the statute. Clause (b) contemplates the case of an undivided Hindu family. Such a family may consist of a number of members who are generally called co-parceners. As all the co-parceners (among whom there may be females and minors) more often than not, do not, participate in the management of the family affairs, it will simply be unjust to drag the whole lot of them to the Criminal Court if the family property comprises a money-lending business and some offence is committed in relation to that. Therefore, the clause expressly declares that in the case of such a Hindu joint family those of its members (whether such members include the *Karta* or not) who *knowingly* or *wilfully* share the contravention of, or default in compliance with, the statute, will be answerable for the Criminal charge. Read in this connection the notes under the heading, "Licence held by any other person affected by the order" at p. 88, *ante*. The Muslim law does not recognise any joint family system, see *Mohabbat Ali* v. *Tofar Ali*, A.I.R. 1923 Cal. 369=76 I.C. 481 ; *Fatima Bibi* v. *Radha Shyam*, A.I.R. 1926 Cal. 343=87 I.C. 660 ; *Lakshana Chandra* v. *Takim Dhali*, 28 C.W.N. 1033=39 C.L.J. 90=A.I.R. 1924 Cal. 558=80 I.C. 357 ; see also author's *Anglo-Mahomedan Law*, pp. 68-69. Therefore, no similar provision has been thought necessary in the case of Mahomedan families. In the case of the non-Hindu joint families, the position of their members are that of co-contractors and partners, and each member in his turn is a lender. Read the notes under the heading "Money-lending business in partnership at p. 34, *ante*. Such members are however subject to the condition about registration contained in sec. 69 of the Partnership Act, which may affect their right of suit. Under clause (c), if the money-lender is a body corporate, then

the person to answer a charge hereunder will be its director or some one of its other officers who *knowingly* or *wilfully* contravenes, or fails to comply with, any of the provisions of this Act. Clause (d) provides for the case of an unincorporated body; in this last case any member of such body, who is knowingly and wilfully a party to any default in complying with, or any contravention of, any provision of this Act, will be the person liable to prosecution hereunder.

Knowingly and wilfully : The word "and" shows that knowledge and intention are to be taken conjunctively and both of them must combine to make an act criminal. Either of them standing by itself is insufficient to constitute an offence. Read in this connection the general observations in *Tolson's* case, (1889) 23 Q.B.D. 168 (172). Inadvertent omissions or commissions, or acts done in good faith, or arising out of errors of judgment are bereft of these elements of criminal knowledge and intention and are therefore not within the perils of this section.

On conviction : These words imply that there should be a regular trial on a charge of contravention of, or default in complying with, the provisions of this Act. The accused person should be found guilty of the charge levelled against him. The charges should be formally drawn up in conformity with the provisions of Chapter XIX of the Code of Criminal Procedure, and the accused should be given an opportunity to meet them. If the charges are substantiated in the course of the trial, an order will be made convicting the accused and one or other of the sentences mentioned in the three sub-clauses (i) to (iii) will follow, namely (i) for the first offence, a sentence of fine extending to Rs. 200/- will be inflicted, (ii) for the second offence, the sentence may consist of a fine for an amount up to Rs. 500/- and (iii) for any subsequent offence, the sentence is to consist of rigorous imprisonment for *three* months and also of fine *in addition* to the term of hard labour (notice the word "and"). There being no specific mention of the amount of fine in this third instance, it follows that it would be open to the Court to inflict a fine of *any* amount, if not altogether irrational or unjust [*vide* sec. 63 of the Indian Penal Code.]. It may be mentioned here that when a particular statute creates an offence and provides a penalty for it, that particular penalty is to be imposed and no other, *Ashutosh Ganguli* v. *Watson*, 53 Cal. 929=44 C.L.J. 350=98 I.C. 116—referring to *Queen* v. *Cubitt*, (1899) 22 Q.B.D. 622.

Sub-section (2) : **No right of private complaint :** Cognizance of an offence punishable under sub-section (1) can be taken by a Court only on the complaint *in writing* of the Provincial

Registrar or a Registrar and not upon any private complaint. For the Provincial Registrar and a Registrar, *vide* section 6, *ante*. A sub-registrar has no power to lodge a complaint under this section. If a sub-registrar or any private individual is desirous of obtaining a conviction of a money-lender under this section, he should petition the Provincial Registrar or a Registrar to move in the matter. Sub-sections (2) and (3) are intended as safeguards against frivolous complaints.

Sub-section (3) : **Withdrawal of complaint :** Under this sub-section, the Provincial Registrar has been given the power of making an order directing the withdrawal of a complaint made, whether by himself or by a Registrar, under sub-section (2) of this section. If the Provincial Registrar makes an order for withdrawal of a complaint hereunder, he shall forward a copy of the order to the trying Court, which upon receipt of such copy of the order of withdrawal will altogether drop the proceeding after entering a *nolle prosequi* in the case. Evidently, a withdrawal of proceeding hereunder is possible only before a final order has been passed in the case. Cf. section 248 of the Cr. P. Code. The Provincial Registrar will have power to order withdrawal of a proceeding which was started on the *written* complaint of a Registrar. The power of withdrawal hereunder has been vested in the Provincial Registrar only. A Registrar will have no such power even when the complaint was lodged by himself. When a withdrawal has been ordered by the Provincial Registrar and the order has been communicated to the trying Magistrate, the latter has no discretion similar to the one under section 248 of the Criminal Procedure Code to disallow the withdrawal. Notice that the provision of the section is imperative as is apparent from the use of the word "shall". Consult in this connection *Sisir Kumar* v. *Corporation of Calcutta*, 43 C.L.J. 369=30 C.W.N. 598=96 I.C. 648 ; *Bayan Ali* v. *King-Emperor*, 20 C.W.N. 1209. [A case is withdrawn under section 248, Cr. P. C., without the consent of the accused.]

Sub-section (4) : **Which Court is to try an offence hereunder :** Under the last item in Schedule II of the Code of Criminal Procedure, 1898, an offence under this section will be triable by "any Magistrate", but this sub-section (4) puts a limitation on this wide provision by laying down that no Court inferior to that of a Presidency Magistrate or sub-divisional Magistrate or a Magistrate of the first class will have power to try an offence punishable under sub-section (1). Thus, in the matter of trial, offences under this Act stand on a footing different from those under the Indian Penal Code.

Protection to persons acting under this Act.

43. No suit, prosecution or proceeding shall lie against any servant of the Crown in India for anything which is in good faith done or intended to be done under this Act.

Protection to Servants of Crown for acts done under the Act : The section provides an indemnity clause protecting Government officers from being subjected to legal proceedings for acts done or intended to be done by them under this Act. In order to be entitled to the immunity prescribed by the section it is necessary that the Servants of the Crown should do the acts in question *in good faith*. In the absence of this element of *good faith,* the section offers no protection. The acts should be done or intended to be done *under this Act,* otherwise there is no protection hereunder. The onus of proving good faith will be on the Government officer concerned.

Analogous Law : See section 1 of the English Public Authorities Protection Act, 1893; also read *Fielding* v. *Morley Corporation,* (1899) 1 Ch. 1.

Power to make rules.

44. (1) The Provincial Government may, subject to the condition of previous publication, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for the following matters, namely:—

(*a*) the conditions referred to in the proviso to section 3;

(*b*) the control to be exercised by the Provincial Registrar over Registrars and Sub-Registrars and by a Registrar over Sub-Registrars;

(*c*) the form in which registers under section 7 shall be maintained;

(*d*) the form and manner in which an application for the grant of a licence shall be made, and the particulars to be therein contained;

(*e*) the manner in which licence fees and penalties shall be paid;

(*f*) the form of licences;

(*g*) the form of, and the fee payable on, an application under sub-section (2) of section 14;

(*h*) the procedure to be followed by a Competent Court or by a Registrar in proceedings under section 16;

(*i*) the form in which a Court shall send the substance of the order referred to in sub-section (5) of section 20, and the method of circulation of the same to other Registrars;

(*j*) the form in which a money-lender shall maintain his cash book, ledger and receipt book;

(*k*) the form of, and the particulars to be contained in the statement to be delivered under sub-section (2) of sec. 24;

(*l*) the form of the statements to be furnished under section 25 and the fee to be paid under the proviso to sub-section (3) of that section;

(*m*) the form in which information shall be supplied to an assignee under clause (*b*) of sub-section (1) of section 28;

(*n*) the form in which notice shall be given by the plaintiff to the defendant under sub-clause (*ii*) of clause (*a*) of sub-section (1) of section 34, and by the decree-holder to the judgment-debtor under sub-section (2) of that section;

(*o*) the form of an application under section 38; and

(*p*) the manner in which an application under section 39 shall be made.

Rule making Power : The Provincial Government has been vested by this section with a power to frame rules for the purpose of carrying into effect the provisions of this Act. The Provincial

Government has no power to make any rule the object whereof is not to *carry* out the purposes of the Act or the effect of which is to enact new laws. The rule-making power confered by this section is however, subject to one condition, *viz.* that the rules framed by the Provincial Government should be previously published in the *Official Gazette.* Sub-section (1) of the section confers this rule making power on the Provincial Government in a general manner; then sub-section (2) mentions certain specific instances in which the Provincial Government will be entitled to exercise its aforesaid rule-making power. These specific instances have been enumerated in the clauses (a) to (p) of sub-section (2). The effect of this specific enumeration is not to prejudice or affect the general power conferred by sub-section (1). This is the significance of the condition, "without prejudice to the generality of the foregoing provision" in sub-section (2). Therefore, simply because a rule framed by the Provincial Government cannot be brought under any of the heads mentioned in clauses (a) to (p) of sub-section (2), it cannot be contended that such a rule, although it fulfils the conditions of previous publication and utility in carrying out the purposes of the Act is *ultra* vires of the Provincial Government. Ordinarily, where Rules are framed under the authority of a section of an Act, the section generally says that the Rules will have the effect of statutory law; compare section 79 (3) of the Provincial Insolvency Act. It has been held that unless the section authorising the framing of a Rule says that it will have the force of law, it will not be law, *Emperor* v. *Abdul,* 2 Pat. 134= A.I.R. 1923 Pat. 1=68 I.C. 945. The present section does not say that the Rules are to have effect as if enacted in the Act itself, still obedience to the Rules have been enjoined almost in all the relevant sections by the use of the word "prescribed" and the effect of this is to give the Rules the authority and sanctity of law.

Rules framed under the Act cannot over-ride the statute : Rules framed by the Provincial Government in exercise of the power conferred by this section cannot override the provisions of the Act itself, because the very object of the Rules framed hereunder is to *carry out* the purposes of the Act and not to stultify or nullify its provisions. The Provincial Government can exercise its rule-making power under this section only within the narrow limits indicated herein and if it transgresses those limits and makes rules in excess of its powers, those rules will be *ultra vires* and carry no legal effect. The Rules are subservient to the provisions of the Act and give no indication as to their real and true import and, therefore, cannot be referred to for the purpose of construing the provisions of law contained in the body of the enactment, *Sheik Intaz* v. *Dinanath,* 53 Cal. 615=43 C.L.J. 425=30

C.W.N. 803=A.I.R. 1926 Cal. 856=96 I.C. 72. In cases of apparent conflicts between the rules and the sections, an attempt should at first be made to reconcile them, but if reconciliation is altogether impossible, one should go by the sections themselves in derogation of the Rules, read *Institutes of Patent Agents* v. *Lockwood,* 1894 A.C. 347 (360).

Rules when to be framed with the aproval of the Provincial Legislature : Under clause (a) of sub-section (2) the Provincial Government can frame rules prescribing the conditions which a Bank will have to comply with before it can claim to be declared a notified bank, under section 3 of the Act ; but said section 3 has laid down that these conditions should be drawn up with the approval of the Provincial Legislature. In the absence of such approval the rules prescribing the tests or conditions for a notified bank will be *ultra vires* and have no legal force.

Bengal Act VII of 1933 not to apply to loans to which this Act applies.

45. The Bengal Money-lenders Act, 1933, shall not apply to any loan to which this Act applies nor to any transaction connected with such loan.

This section withholds the operation of the Bengal Money-Lenders Act, 1933 (Beng. Act VII of 1933) in relation to the loans to which the Act applies or in relation to any transaction connected with such loans. Therefore, although the Bengal Money-Lenders Act, 1933 is still an unrepealed Act and is still on the Statute Book, yet it is *pro tanto* abrogated by the provisions of this Act ; read the notes at p. 1, under the heading, "Preamble". The Bengal Money-Lenders Act, 1933 contains no definition of the term *loan,* but in its section 2 (1) it has defined the term "money-lender" as a person who grants a loan of money. Evidently, in that Act, the term *loan* has been used in a broader sense than in this Act. Loans which fall outside the scope of section 2 (12) of this Act, may yet be within the scope of the Bengal Money-Lenders Act, 1933. The word "loan" as used in this section should be understood with reference to the Definition Clause of this Act, and not in the wide sense in which the term has been used in the Bengal Money-Lenders Act, 1933.

It may be pointed out here that the provisions of the Bengal Money-Lenders' Act, 1933 secured considerable advantages to the borrowers [*Mrinalini Debi* v. *Hari Lal Roy,* 63 C.L.J. 117=A.I.R. 1936 Cal. 339=168 I.C. 902], and that this Act has effected further improvements in the matter.

Loans to which this Act of 1933 applies : The *exceptions* mentioned at p. 29, *ante,* are not loans for the purposes of this Act, but all the same for other purposes they must be loans and in respect of them the Act of 1933 may still apply. Once it is shown that a loan falls within the definition of the term as given in sec. 2(12), *ante,* the Act of 1933 will at once cease to operate in relation to the same. Not only the loans answering the definition of sec. 2 (12) of this Act go out of the operation of the Act of 1933 but the transactions connected with such loans also will fall outside the scope thereof.

The chief points of difference between this Act and the Act of 1933 : (1) The rates of interest under the present Act are much lower than those of the Act of 1933. (2) There was no prohibition as to compound interest in the Act of 1933. (3) The former Act no doubt recognised the rule of Damdupat but it took no account of the realisations already made : but under the present Act, the rule of Damdupat is applied with reference to the entire dues upon the loan, taking into account the past realisations. (4) Under the former Act the Court could use its discretion to some extent in applying or not applying the rule of Damdupat, but under the present Act the Court has no such discretion. (5) Loans made within the limits of the Ordinary Original jurisdiction of the Calcutta High Court stood outside the Act of 1933, but that is not the case with the present Act. (6) The questions of harshness, impropriety, unfairness in a loan played some part in the Act of 1933 but these things are of no consideration in the present Act which goes by a few rigid rules. (7) In order to obtain informations as to the particulars of the loan, the debtor had to make a formal demand under the old Act, but under the present Act this matter has been put on a regular business system and made periodical.

THE SCHEDLE.

[*See* sections 14(*1*)(*b*) and 15.]

Any offence punishable under any of the following sections of the Indian Penal Code, namely, sections 379 to 382, 384 to 389, 392 to 404, 406 to 409, 411 to 414, 417 to 424, 449, 450, 451 (with intent to commit theft), 454 (with intent to commit theft), 455, 457 (with intent to commit theft), 458

to 462, 465, 477 and 477A or under section 52 of the Indian Post Office Act, 1898.

These offences of the Penal Code are as follows :

Ss. 379-382 : Theft of various descriptions.

Ss. 384-389 : Extortions of various descriptions.

Ss. 392-404 : Robbery, Dacoity, thieving in gangs, misappropriation.

Ss. 406-409 : Criminal Breach of Trust.

411- 14 : Receiving Stolen property, etc.

417-424 : Cheating, fraudulent concealment, etc.

449-451 : House trespass with grave offences.



APPENDIX A.

[63 & 64 VICT.] **Moneylenders Act, 1900.** [CH. 51]

(ENGLAND)

CHAPTER 51.

A. D. 1900.

An Act to amend the Law with respect to Persons carrying on business as Money-lenders.

[8th August 1900.]

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

Re-opening of transactions of money-lender.

1.—(1) Where proceedings are taken in any Court by a money-lender for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act, in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a Court of equity would give relief, the Court may re-open the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and charges, as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the money-lender, and if the

A. D. 1900.

money-lender has parted with the security may order him to indemnify the borrower or other person sued.

(2) Any Court in which proceedings might be taken for the recovery of money lent by a money-lender shall have and may, at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent, and the Court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety, or other person liable, notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived.

(3) On any application relating to the admission or amount of a proof by a money-lender in any bankruptcy proceedings, the Court may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of money

(4) The foregoing provisions of this section shall apply to any transaction which, whatever its form may be, is substantially one of money-lending by a money-lender.

(5) Nothing in the foregoing provisions of this section shall affect the rights of any *bona fide* assignee or holder for value without notice.

(6) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any Court.

(7) In the application of this Act to Scotland this section shall be read as if the words " or is otherwise such that a Court of equity would give relief " were omitted therefrom.

N. B. This Act was supplemented by the English Money-lenders Act, 1911 [1 & 2 Geo. 5, C. 38] which was repealed by the Act of 1927.

[17 & 18 Geo. 5.] **Moneylenders Act, 1927.** [Ch. 21.]

(England)

CHAPTER 21.

A. D. 1927.
[29th July 1927.]

An Act to amend the Law with respect to persons carrying on business as Moneylenders.

Be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Licences to be taken out by moneylenders.

1.—(1) Every moneylender, whether carrying on business alone or as a partner in a firm, shall take out annually in respect of every address at which he carries on his business as such, an excise licence (in this Act referred to as "a moneylender's excise licence"), which shall expire on the thirty-first day of July in every year, and, subject as hereinafter provided, there shall be charged on every moneylender's excise licence an excise duty of fifteen pounds, or if the licence be taken out not more than six months before the expiration thereof, of ten pounds.

Provided that—

(*a*) the duty charged on any moneylender's excise licence which will expire on the thirty-first day of July, nineteen hundred and twenty-eight, shall, notwithstanding that the licence may be taken out more than six months before the expiration thereof, be a duty of ten pounds; and

(*b*) where moneylender's excise licences are taken out by two or more moneylenders in respect of any address or addresses at which they carry on their business as partners in a firm, the Commissioners of Customs and Excise shall remit, or if the duty has been paid repay, to the firm a sum equal to the aggregate of the duties charged on such number of the licences taken out as exceeds the number of the addresses in respect of which they are taken out; and

(c) where it is proved to the satisfaction of the Commissioners of Customs and Excise that there is in force a licence for carrying on the business of a pawnbroker at any premises in respect of which a moneylender's excise licence is taken out by the person carrying on the business, the Commissioners shall remit, or if the duty has been paid repay, to that person such part of the duty charged on the moneylender's excise licence as is equal to the amount of the duty paid in respect of the licence for carrying on the business of a pawnbroker, or where in any such case moneylender's excise licences are taken out by partners in a firm in respect of the premises, the remission or repayment shall be made to the firm.

(2) Subject to the provisions of this Act, moneylender's excise licences shall be in such form as the Commissioners of Customs and Excise may direct, and shall be granted on payment of the appropriate duty by any officer of Customs and Excise authorised by the Commissioners to grant them; and regulations made by the said Commissioners may make provision as to the procedure to be followed in making application for moneylenders' excise licences:—

Provided that a moneylender's excise licence shall be taken out by a moneylender in his true name, and shall be void if it be taken out in any other name, but every moneylender's excise licence shall also show the moneylender's authorised name and authorised address.

(3) If any person—

(a) takes out a money-lender's excise licence in any name other than his true name; or

(b) carries on business as a moneylender without having in force a proper moneylender's excise licence authorising him so to do, or, being licensed as a moneylender, carries on business as such in any name other than his authorised name, or at any other place than his authorised address or addresses; or

(c) enters into any agreement in the course of his business as a moneylender with respect to the advance or repayment of

money, or takes any security for money, in the course of his business as a moneylender, otherwise than in his authorised name ;

he shall be guilty of a contravention of the provisions of this Act and shall for each offence be liable to an excise penalty of one hundred pounds:

Provided that, on a second or subsequent conviction of any person (other than a company) for an offence under this sub-section, the Court may, in lieu of or in addition to ordering the offender to pay the penalty aforesaid, order him to be imprisoned for a term not exceeding three months, and an offender being a company shall on a second or subsequent conviction be liable to an excise penalty of five hundred pounds.

Certificate required for grant of money-lender's excise licence.

2.—(1) A moneylender's excise licence shall not be granted except to a person who holds a certificate granted in accordance with the provisions of this section authorising the grant of the licence to that person, and a separate certificate shall be required in respect of every separate licence. Any moneylender's excise licence granted in contravention of this section shall be void.

(2) Certificates under this section (in this Act referred to as "certificates") shall be granted by the petty sessional Court having jurisdiction in the petty sessional division in which the moneylender's business is to be carried on, so, however, that within any part of the metropolitan police district for which a police Court is established, a certificate shall not be granted except by a police magistrate.

(3) Every certificate granted to a moneylender shall show his true name and the name under which, and the address at which, he is authorised by the certificate to carry on business as such, and a certificate shall not authorise a moneylender to carry on business at more than one address, or under more than one name, or under any name which includes the word "bank," or otherwise implies that he carries on banking business, and no certificate shall authorise a moneylender to carry on business under any name except—

(*a*) his true name; or

(*b*) the name of a firm in which he is a partner, not being a firm required by the Registration of Business Names Act, 1916, to be registered; or

(*c*) a business name, whether of an individual or of a firm in which he is a partner, under which he or the firm has, at the passing of this Act, been registered for not less than three years both as a moneylender under the Moneylenders Act, 1900, and under the Registration of Business Names Act, 1916.

(4) A certificate shall come into force on the date specified therein, and shall expire on the next following thirty-first day of July.

(5) A Secretary of State shall make rules with respect to the procedure to be followed in making applications for certificates (including the notices to be given of intention to make such an application), and certificates shall be in such form as may be prescribed by rules so made.

(6) A certificate shall not be refused except on some one or more of the following grounds—

(*a*) that satisfactory evidence has not been produced of the good character of the applicant, and in the case of a company of the persons responsible for the management thereof;

(*b*) that satisfactory evidence has been produced that the applicant, or any person responsible or proposed to be responsible for the management of his business as a moneylender, is not a fit and proper person to hold a certificate;

(*c*) that the applicant, or any person responsible or proposed to be responsible for the management of his business as a moneylender, is by order of a Court disqualified for holding a certificate;

(*d*) that the applicant has not complied with the provisions of any rules made under this section with respect to applications for certificates.

(7) Any person aggrieved by the refusal of a petty Sessional Court to grant a certificate may appeal to a Court of quarter sessions in manner provided by the Summary Jurisdiction Acts as if the refusal were an order of a Court of summary jurisdiction.

Suspension and forfeiture of money-lenders' certificates.

3.—(1) Where any person, being the holder of a certificate, is convicted of any offence under this Act or under section two or four of the Betting and Loans (Infants) Act, 1892, or the Money-lenders Act, 1900, the Court—

(*a*) may order that any certificates held by that person, and in the case of a partner in a firm by any other partner in the firm, shall either be suspended for such time as the Court thinks fit or shall be forfeited, and may also, if the Court thinks fit, declare any such person, or any person responsible for the management of the moneylending business carried on by the person convicted, to be disqualified for obtaining a certificate for such time as the Court thinks fit; and

(*b*) shall cause particulars of the conviction and of any order made by the Court under this sub-section to be endorsed on every certificate held by the person convicted or by any other person affected by the order, and shall cause copies of those particulars to be sent to the authority by whom any certificate so endorsed was granted, and to the Commissioners of Customs and Excise:

Provided that, where by order of a Court a certificate held by any person is suspended or forfeited, or any person is disqualified for obtaining a certificate, he may, whether or not he is the person convicted, appeal against the order in the same manner as any person convicted may appeal against his conviction, and the Court may, if it thinks fit pending the appeal, defer the operation of the order.

(2) Any certificate required by a Court for endorsement in accordance with the foregoing provisions of this section shall be produced, in such manner and within such time as may be directed by the Court, by the person by whom it is held, and any

person who, without reasonable cause, makes default in producing any certificate so required shall, in respect of each offence, be liable on summary conviction to a penalty not exceeding five pounds for each day during which the default continues.

(3) Where a certificate held by any person is ordered to be suspended or to be forfeited under the foregoing provisions of this section, any moneylender's excise licences granted to that person, whether in pursuance of that or any other certificate, shall be suspended during the period for which the certificate is ordered to be suspended or become void, as the case may be.

Names to be stated on documents issued by money-lenders (7 & 8. Geo. 5. c. 28).

4.—(1) Subsection (2) of section two of the Companies (Particulars as to Directors) Act, 1917 (which requires certain particulars to be published in trade catalogues; trade circulars, show cards and business letters) shall apply with the necessary modifications to every company licensed under this Act notwithstanding that the company was registered or had established a place of business within the United Kingdom on or before the twenty-second day of November, nineteen hundred and sixteen.

(2) Without prejudice to the provisions of the last foregoing section and of section eighteen of the Registration of Business Names Act, 1916, a moneylender shall not, for the purposes of his business as such, issue or publish, or cause to be issued or published, any advertisement, circular, business letter, or other similar document which does not show—

(*a*) in such manner as to be not less conspicuous than any other name, the authorised name of the moneylender ; and

(*b*) except in the case of an advertisement published in a newspaper, any name, other than his authorised name, under which the moneylender, and in the case of a firm any partner therein, was before the commencement of this Act registered as a moneylender under the Moneylenders Act, 1900 ; and any moneylender who acts in contravention of this sub-section shall be liable on summary conviction to a fine not exceeding twenty pounds in respect of each offence.

(3) If a moneylender, for the purposes of his business as such, issues or publishes, or causes to be issued or published, any advertisement, circular or document of any kind whatsoever containing expressions which might reasonably be held to imply that he carries on banking business, he shall on summary conviction be liable to a fine not exceeding one hundred pounds, and on a second or subsequent conviction, in lieu of or in addition to such a fine as aforesaid, to imprisonment for a term not exceeding three months, or, in the case of a second or subsequent conviction of an offender being a company, to a fine not exceeding five hundred pounds.

Restriction on moneylending advertisements.

5.—(1) No person shall knowingly send or deliver or cause to be sent or delivered to any person except in response to his written request any circular or other document advertising the name, address or telephone number of a moneylender, or containing an invitation—

(*a*) to borrow money from a moneylender;

(*b*) to enter into any transaction involving the borrowing of money from a moneylender;

(*c*) to apply to any place with a view to obtaining information or advice as to borrowing any money from a moneylender.

(2) Subject as hereinafter provided, no person shall publish or cause to be published in any newspaper or other printed paper issued periodically for public circulation, or by means of any poster or placard, an advertisement advertising any such particulars, or containing any such invitation, as aforesaid:

Provided that an advertisement, in conformity with the requirements of this Act relating to the use of names on moneylenders' documents may be published by or on behalf of a moneylender in any newspaper or in any such paper as aforesaid or by means of a poster or placard exhibited at any authorised address of the moneylender, if it contains no addition to the particulars necessary to comply with the said requirements, except any of the following particulars, that is to say any

authorised address at which he carries on business as a moneylender and the telegraphic address and telephone number thereof, any address at which he formerly carried on business, a statement that he lends money with or without security, and of the highest and lowest sums that he is prepared to lend, and a statement of the date on which the business carried on by him was first established.

(3) No moneylender or any person on his behalf shall employ any agent or canvassor for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a moneylender, and no person shall act as such agent or canvasser, or demand or receive directly or indirectly any sum or other valuable consideration by way of commission or otherwise for introducing or undertaking to introduce to a moneylender any person desiring to borrow money.

(4) Where any document issued or published by or on behalf of a moneylender purports to indicate the terms of interest upon which he is willing to make loans or any particular loan, the document shall either express the interest proposed to be charged in terms of a rate per cent. per annum or show the rate per cent. per annum represented by the interest proposed to be charged as calculated in accordance with the provisions of the First Schedule to this Act.

(5) Any person acting in contravention of any of the provisions of this section shall be guilty of a misdemeanour and shall in respect of each offence be liable, on conviction on indictment, to imprisonment for a term not exceeding three months or a fine not exceeding one hundred pounds, or to both such imprisonment and fine, and on summary conviction to imprisonment for a term not exceeding one month or to a fine not exceeding twenty pounds, or to both such imprisonment and fine.

(6) Where it is shown that a money-lending transaction was brought about by a contravention of any of the provisions of this section, the transaction shall, notwithstanding that the

moneylender was duly licensed under this Act, be illegal, unless the moneylender proves that the contravention occurred without his consent or connivance.

Form of moneylenders' contracts.

6.—(1) No contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender after the commencement of this Act or for the payment by him of interest on money so lent and no security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be enforceable, unless a note or memorandum in writing of the contract be made and signed personally by the borrower, and unless a copy thereof be delivered or sent to the borrower within seven days of the making of the contract; and no such contract or security shall be enforceable if it is proved that the note or memorandum aforesaid was not signed by the borrower before the money was lent or before the security was given as the case may be.

(2) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and, either the interest charged on the loan expressed in terms of a rate per cent per annum, or the rate per cent. per annum represented by the interest charged as calculated in accordance with the provisions of the First Schedule to this Act.

Prohibition of compound interest and provision as to defaults.

7.—Subject as hereinafter provided, any contract made after the commencement of this Act for the loan of money by a moneylender shall be illegal in so far as it provides directly or indirectly for the payment of compound interest or for the rate or amount of interest being increased by reason of any default in the payment of sums due under the contract:

Provided that provision may be made by any such contract that if default is made in the payment upon the due date of any sum payable to the moneylender under the contract, whether in respect of principal or interest, the moneylender shall be entitled to charge simple interest on that sum from the date of the

default until the sum is paid, at a rate not exceeding the rate payable in respect of the principal apart from any default, and any interest so charged shall not be reckoned for the purposes of this Act as part of the interest charged in respect of the loan.

Obligation of moneylender to supply information as to state of loan and copies of documents relating thereto.

8.—(1) In respect of every contract for the repayment of money lent by a moneylender whether made before or after the commencement of this Act, the moneylender shall, on any reasonable demand in writing being made by the borrower at any time during the continuance of the contract and on tender by the borrower of the sum of one shilling for expenses, supply to the borrower or, if the borrower so requires, to any person specified in that behalf in the demand, a statement signed by the moneylender or his agent showing—

(*a*) the date on which the loan was made, the amount of the principal of the loan and the rate per cent. per annum of interest charged; and

(*b*) the amount of any payment already received by the moneylender in respect of the loan and the date on which it was made; and

(c) the amount of every sum due to the moneylender, but unpaid, and the date upon which it became due, and the amount of interest accrued due and unpaid in respect of every such sum; and

(*d*) the amount of every sum not yet due which remains outstanding, and the date upon which it will become due.

(2) A moneylender shall, on any reasonable demand in writing by the borrower, and on tender of a reasonable sum for expenses, supply a copy of any document relating to a loan made by him or any security therefor, to the borrower, or if the borrower so requires, to any person specified in that behalf in the demand.

(3) If a moneylender to whom a demand has been made under this section fails without reasonable excuse to comply

therewith within one month after the demand has been made, he shall not, so long as the default continues, be entitled to sue for or recover any sum due under the contract on account either of principal or interest, and interest shall not be chargeable in respect of the period of the default, and if such default is made or continued after proceedings have ceased to lie in respect of the loan, the moneylender shall be liable on summary conviction to a fine not exceeding five pounds for every day on which the default continues.

Provisions as to bankruptcy proceedings for moneylenders' loans.

9.—(1) Where a debt due to a moneylender in respect of a loan made by him after the commencement of this Act includes interest, that interest shall, for the purposes of the provisions of the Bankruptcy Act, 1914, relating to the presentation of a bankruptcy petition, voting at meetings, compositions and schemes of arrangement, and dividend, be calculated at a rate not exceeding five per cent. per annum, but nothing in the foregoing provision shall prejudice the right of the creditor to receive out of the estate, after all the debts proved in the estate have been paid in full, any higher rate of interest to which he may be entitled.

The provisions of this sub-section shall, in relation to such a debt as aforesaid, have effect in substitution for the provisions of sub-section (1) of section sixty-six of the Bankruptcy Act, 1914.

(2) No proof of a debt due to a moneylender in respect of a loan made by him shall be admitted for any of the purposes of the Bankruptcy Act, 1914, unless the affidavit verifying the debt is accompanied by a statement showing in detail—

(*a*) the amount of the sums actually lent to the debtor and the dates on which they were lent, and the amount of every payment already received by the moneylender in respect of the loan and the date on which every such payment was made; and

(*b*) the amount of the balance which remains unpaid distinguishing the amount of the principal from the amount of interest included therein, the appropriation between principal

and interest being made in accordance with the provisions of this Act where the interest is not expressed by the contract for the loan in terms of a rate ; and

(c) where the amount of interest included in the unpaid balance represents a rate per cent. per annum exceeding five per cent. the amount of interest which would be so included if it were calculated at the rate of five per cent. per annum.

(3) General rules may be made under section one hundred and thirty-two of the Bankruptcy Act, 1914, for the purpose of carrying into effect the objects of this section.

Amendment of 63 & 64 Vict. c. 51 s. 1.

10.—(1) Where, in any proceedings in respect of any money lent by a money-lender after the commencement of this Act or in respect of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, it is found that the interest charged exceeds the rate of forty-eight per cent. per annum, or the corresponding rate in respect of any other period, the Court shall, unless the contrary is proved, presume for the purposes of section one of the Moneylenders Act, 1900, that the interest charged is excessive and that the transaction is harsh and unconscionable, but this provision shall be without prejudice to the powers of the Court under that section where the Court is satisfied that the interest charged, although not exceeding forty-eight per cent. per annum, is excessive.

(2) Where a Court reopens a transaction of a moneylender under the said section one of the Moneylenders Act, 1900, the Court may require the moneylender to produce any certificate granted to him in accordance with the provisions of this Act, and may cause such particulars as the Court thinks desirable to be endorsed on any such certificate, and a copy of the particulars to be sent to the authority by whom the certificate was granted.

(3) The powers of a Court under the said section one of the Moneylenders Act, 1900, with respect to the re-opening of the transactions of moneylenders, shall extend to any transaction

effected under a special contract made in accordance with the provisions of section twenty-four of the Pawnbrokers Act, 1872, and accordingly, for the purposes of the first mentioned section the provisions of paragraph (*a*) of section six of the Moneylenders Act, 1900, shall not apply with respect to any such transaction.

(4) The powers of a Court under sub-section (2) of the said section one of the Moneylenders Act, 1900 (which enables a Court at the instance of the borrower, surety, or other person liable, to exercise its powers under that section with respect to the re-opening of the transactions of moneylenders, although no proceedings are taken for the recovery of money lent, and notwithstanding that the time for repayment may not have arrived) may in the event of the bankruptcy of the borrower be exercised at the instance of the trustee in bankruptcy, notwithstanding that he may not be a person liable in respect of the transaction.

(5) The powers of a Court under the said subsection (2) of section one of the Moneylenders Act, 1900, may be exercised notwithstanding that the moneylender's right of action for the recovery of the money lent is barred.

Courts to which proceedings on moneylending transactions are to be taken.

11.—(1) Subject as hereinafter provided, no action by a moneylender for the recovery of money lent by him or for enforcing any agreement or security relating to any such money shall be brought in any inferior Court other than a county Court:

Provided that His Majesty may by Order in Council direct that any inferior Court specified in the Order shall have the same jurisdiction as respects such actions as aforesaid as it would have had but for the provisions of this subsection, and any such Order may contain such provisions as appear to His Majesty expedient with respect to the making of rules of Court for regulating the procedure to be followed in the case of any such action, and may be revoked or varied by any subsequent Order made in like manner.

(2) Before any Order in Council is made under this section a draft thereof shall be laid before each House of Parliament for a period of not less than twenty-one days during the session of Parliament, and if either House before the expiration of the said period presents an address to His Majesty against the draft or any part thereof, no further proceedings shall be taken thereon, but without prejudice to the making of a new draft order.

Prohibition of charge for expenses on loans by moneylenders.

12.—Any agreement between a moneylender and a borrower or intending borrower for the payment by the borrower or intending borrower to the moneylender of any sum on account of costs, charges or expenses incidental to or relating to the negotiations for or the granting of the loan or proposed loan shall be illegal, and if any sum is paid to a moneylender by a borrower or intending borrower as for or on account of any such costs, charges or expenses, that sum shall be recoverable as a debt due to the borrower or intending borrower, or, in the event of the loan being completed, shall, if not so recovered, be set off against the amount actually lent and that amount shall be deemed to be reduced accordingly.

Limitation of time for proceedings in respect of money lent by money-lenders.

13.—(1) No proceedings shall lie for the recovery by a moneylender of any money lent by him after the commencement of this Act or of any interest in respect thereof, or for the enforcement of any agreement made or security taken after the commencement of this Act in respect of any loan made by him, unless the preceedings are commenced before the expiration of twelve months from the date on which the cause of action accrued :

Provided that—

(*a*) if during the period of twelve months aforesaid or at any time within any subsequent period during which proceedings may by virtue of this proviso be brought, the debtor acknowledges in writing the amount due and gives a written under-

taking to the moneylender to pay that amount, proceedings for the recovery of the amount due may be brought at any time within a period of twelve months from the date of the acknowledgment and undertaking;

(*b*) the time limited by the foregoing provisions of this section for the commencement of proceedings shall not begin to run in respect of any payments from time to time becoming due to a moneylender under a contract for the loan of money until a cause of action accrues in respect of the last payment becoming due under the contract;

(*c*) if at the date on which the cause of action accrues or on which any such acknowledgment and undertaking as aforesaid is given by the debtor, the person entitled to take the proceedings is *non compos mentis*, the time limited by the foregoing provisions of this section for the commencement of proceedings shall not begin to run until that person ceases to be *non compos mentis* or dies, whichever first occurs; and

(*d*) if at the date on which the cause of action accrues or on which any such acknowledgment and undertaking as aforesaid is given by the debtor, the debtor is beyond the seas, the time limited by the foregoing provisions of this section for the commencement of proceedings shall not begin to run until he returns from beyond the seas, so, however, that section eleven of the Mercantile Law Amendment Act, 1856 (which relates to the limitation of actions against joint debtors where some are beyond seas) shall have effect as if this section were included among the enactments therein referred to as fixing a period of limitation.

(2) Without prejudice to the powers of a Court under section one of the Moneylenders Act, 1900, if at the time when proceedings are taken by a moneylender in respect of a default in the payment of any sum due to him under a contract for the loan of money, any further amount is outstanding under the contract but not yet due, the Court may determine the contract and order the principal outstanding to be paid to the money-

lender with such interest thereon, if any, as the Court may allow up to the date of payment.

Special provisions as to pawnbrokers' loans.

14.—The provisions of sections six, twelve and thirteen of this Act shall not apply in relation to any loan by a pawnbroker on a pledge, or in relation to any debt in respect of such a loan, or any interest thereon, notwithstanding that the loan is not made in the course of the business carried on by the pawnbroker in accordance with the Acts for the time being in force in relation to pawnbrokers, as long as the following conditions are complied with in respect of the loan :—

(*a*) The pawnbroker shall deliver or send to the pawner within seven days a note or memorandum containing all the terms of the contract, and in particular showing the date on which the loan is made, the amount of the principal of the loan, the interest charged on the loan expressed in terms of a rate per cent. per annum, and any other charges payable by the pawner under the contract, and the rate of interest charged shall not exceed the rate of twenty per cent. per annum ;

(*b*) Subject as hereinafter provided, the pawner shall not be charged any sum on account of costs, charges, or expenses incidental to or relating to the negotiations for or the granting of the loan or proposed loan, except a charge for the preparation of documents relating to the loan not exceeding the sum of one shilling, and a charge equal to the actual amount of any stamp duty paid by the pawnbroker upon any such document:—

Provided that a pawnbroker shall not be deemed to have failed to comply with the foregoing conditions by reason of his having made in good faith and in accordance with the terms of the contract for the loan—

(i) a reasonable charge in respect of the storage or care of any pledge which is not physically delivered to him or which, although so delivered, is of such weight or size that it would not under the Post Office regulations for the time being in force be received for transmission by parcel post ; or

(ii) a charge for interest at a rate not exceeding twenty per cent. per annum upon any sum reasonably expended by the pawnbroker in respect of the storage or care of the pledge ; or

(iii) a charge not exceeding one shilling for rendering any account of the sale of any pledge ; or

(iv) a charge not exceeding one shilling in respect of any inspection of the pawnbroker's books.

(2) Any charge authorised by this section for the preparation of documents relating to a loan, or in respect of stamp duty upon any such document, may be deducted by the pawnbroker from the amount of the loan, and, if so deducted, shall be deemed for the purposes of this Act to be included in the principal.

Interpretation, &c.

15.—(1) In this Act, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say :—

"Authorised name" and "authorised address" mean respectively the name under which and the address at which a moneylender is authorised by a certificate granted under this Act to carry on business as a moneylender ;

"Business name" means the name or style under which any business is carried on, whether in partnership or otherwise ;

"Company" means any body corporate being a moneylender,

"Firm" means an unincorporate body of two or more individuals, or one or more individuals and one or more corporations, or two or more corporations, who have entered into partnership with one another with a view to carrying on business for profit ;

"Interest" does not include any sum lawfully charged in accordance with the provisions of this Act by a moneylender for or on account of costs, charges, or expenses, but save as aforesaid includes any amount, by whatsoever name called, in excess of the principal, paid or payable to a moneylender in consideration of or otherwise in respect of a loan ;

"Principal" means in relation to a loan the amount actually lent to the borrower.

(2) Where by a contract for the loan of money by a moneylender the interest charged on the loan is not expressed in terms of a rate, any amount paid or payable to the moneylender under the contract (other than simple interest charged in accordance with the proviso to section seven of this Act) shall be appropriated to principal and interest in the proportion that the principal bears to the total amount of the interest, and the rate per cent. per annum represented by the intererest charged as calculated in accordance with the provisions of the First Schedule to this Act shall be deemed to be the rate of interest charged on the loan.

Notice and information to be given on assignment of moneylenders' debt.

16.—(1) Where any debt in respect of money lent by a moneylender whether before or after the commencement of this Act or in respect of interest on any such debt or the benefit of any agreement made or security taken in respect of any such debt or interest is assigned to any assignee, the assignor (whether he is the moneylender by whom the money was lent or any person to whom the debt has been previously assigned) shall, before the assignment is made—

(*a*) give to the assignee notice in writing that the debt, agreement or security is affected by the operation of this Act; and

(*b*) supply to the assignee all information necessary to enable him to comply with the provisions of this Act relating to the obligation to supply information as to the state of loans and copies of documents relating thereto,

and any person acting in contravention of any of the provisions of this section shall be liable to indemnify any other person who is prejudiced by the contravention, and shall also be guilty of a misdemeanour, and shall in respect of each offence be liable on conviction on indictment to imprisonment for a term not exceeding two years, or to a fine not exceeding five hundred pounds, or to both such imprisonment and fine, and shall be liable

on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding one hundred pounds.

(2) In this section the expression "assigned" means assigned by any assignment *inter vivos* other than an assignment by operation of law, and the expressions "assignor" and "assignee" have corresponding meanings.

Application of Act as respects assignees.

17.—(1) Subject as hereinafter provided, the provisions of this Act shall continue to apply as respects any debt to a moneylender in respect of money lent by him after the commencement of this Act or in respect of interest on money so lent or of the benefit of any agreement made or security taken in respect of any such debt or interest, notwithstanding that the debt or the benefit of the agreement or security may have been assigned to any assignee, and, except where the context otherwise requires, references in this Act to a moneylender shall accordingly be construed as including any such assignee as aforesaid :

Provided that—

(*a*) notwithstanding anything in this Act—

(i) any agreement with, or security taken by, a money-lender in respect of money lent by him after the commencement of this Act shall be valid in favour of any *bona fide* assignee or holder for value without notice of any defect due to the operation of this Act and of any person deriving title under him ; and

(ii) any payment or transfer of money or property made *bona fide* by any person, whether acting in a fiduciary capacity or otherwise, on the faith of the validity of any such agreement or security, without notice of any such defect shall, in favour of that person, be as valid as it would have been if the agreement or security had been valid ; and

(iii) the provisions of this Act limiting the time for proceedings in respect of money lent shall not apply to any proceedings in respect of any such agreement or security commenced by a *bona fide* assignee or holder for value without notice that the agreement or security was affected by the

operation of this Act, or by any person deriving title under him,

but in every such case the moneylender shall be liable to indemnify the borrower or any other person who is prejudiced by virtue of this section, and nothing in this proviso shall render valid an agreement or security in favour of, or apply to proceedings commenced by, an assignee or holder for value who is himself a moneylender; and

(*b*) for the purposes of this Act and of the Moneylenders Act, 1900, the provisions of section one hundred and ninety-nine of the Law of Property Act, 1925, shall apply as if the expression "purchaser" included a person making any such payment or transfer as aforesaid.

(2) Nothing in this section shall render valid for any purpose any agreement, security, or other transaction which would, apart from the provisions of this Act, have been void or unenforceable.

Application to Scotland.

18. This Act shall apply to Scotland subject to the following modifications—

(*a*) Certificates under section two of this Act shall be granted by the licensing Court under the Licensing (Scotland) Acts, 1903 to 1921, within whose jurisdiction the premises in which the moneylender's business is to be carried on are situated and may be granted either at the general half-yearly meeting of such Court, or at any adjournment thereof, which adjournment they may make from time to time for the purposes of this Act, or at some other meeting specially convened for that purpose, and an appeal against the refusal to grant such a certificate shall lie to the Court of appeal under the said Acts:

(*b*) The power to make rules under subsection (5) of section two of this Act shall include power to make rules with respect to the procedure to be followed in appeals under the foregoing paragraph of this section:

(*c*) The provisions of subsection (3) of section twenty-seven of the Licensing (Scotland) Act, 1903 (which relates to the prescribing of fees), shall extend to the prescribing of fees payable

to clerks of licensing Courts and of Courts of appeal for anything done under this Act:

(*d*) References to the presentation of a bankruptcy petition shall be construed as references to the presentation of a petition for sequestration; "scheme of arrangement" shall mean deed of arrangement; references to the admission of proof of debts shall be construed as references to the ranking of claims or debts; and "affidavit" shall mean oath

(*e*) The Bankruptcy (Scotland) Act, 1913, shall be substituted for the Bankruptcy Act, 1914, except where sub-section (1) of section sixty-six thereof is referred to; and Act of Sederunt under section one hundred and ninety of the said Act of 1913 shall be substituted for general rules under section one hundred and thirty-two of the said Act of 1914:

(*f*) Where decree is granted by any Court in favour of a monylender for any sum of money in respect of a loan by him, the Court may, either at the time of granting such decree or at any time thereafter prior to the payment of such sum and on the application of either party, make an order that such sum shall be payable by instalments of such amount and subject to such conditions as the Court shall think fit:

(*g*) Section eleven of this Act shall not apply:

(*h*) Notwithstanding anything to the contrary in any Act contained, summary execution or diligence shall not be competent upon any bill of exchange or promissory note, or upon any bond or obligation registered in the books of any Court, where such bill, promissory note, bond or obligation has been granted to or in favour of or is held by a moneylender.

Short title, citation, construction, repeal, extent and commencement.

19.—(1) This Act may be cited as the Moneylenders Act, 1927, and the Moneylenders Act, 1900, and this Act may be cited together as the Moneylenders Acts, 1900 to 1927.

(2) Except where the context otherwise requires, references to this Act to the Moneylenders Act, 1900, shall be construed as references to that Act as amended by this Act, and this Act

shall be construed as one with that Act, and the provisions of this Act as to moneylender's excise licences and offences in relation thereto shall also be construed as one with the Acts relating to duties of excise and the management of those duties.

(3) The enactments set out in the Second Schedule to this Act are hereby repealed to the extent specified in the third column of that Schedule:

Provided that section one of the Moneylenders Act, 1911, shall continue in force as respects any agreement with or security taken by a moneylender before the commencement of this Act, or any payment or transfer of money or property made, whether before or after the commencement of this Act, on the faith of the validity of any such agreement or security.

(4) This Act shall not extend to Northern Ireland.

(5) Except as hereinafter provided this Act shall come into force on the first day of January, nineteen hundred and twenty-eight:

Provided that—

(*a*) subject to the provisions of any regulations or rules made under this Act, licences and certificates may be granted to moneylenders at any time after the first day of October, nineteen hundred and twenty seven; and

(*b*) Orders in Council may be made under the provisions of this Act relating to Courts to which proceedings on moneylenders' transactions are to be taken at any time after the passing of this Act,

so, however, that no such licence or Order in Council shall come into force until the commencement of this Act.

Nothing in the foregoing proviso shall be construed to limit or otherwise affect the provisions of section thirty-seven of the Interpretation Act, 1889.

SCHEDULES.

Sections 5, and 6 and 15.

FIRST SCHEDULE.

CALCULATION OF INTEREST WHERE THE INTEREST CHARGED ON A LOAN IS NOT EXPRESSED IN TERMS OF A RATE.

1. The amount of principal outstanding at any time shall be taken to be the balance remaining after deducting from the principal the total of the portions of any payments appropriated to principal in accordance with the provisions of this Act.

2. The several amounts taken to be outstanding by way of principal during the several periods ending on the dates on which payments are made shall be multiplied in each case by the number of calendar months during which those amounts are taken to be respectively outstanding, and there shall be ascertained the aggregate amount of the sum so produced.

3. The total amount of the interest shall be divided by one-twelfth part of the aggregate amount mentioned in paragraph 2 of this Schedule, and the quotient, multiplied by one hundred, shall be taken to be the rate of interest per cent. per annum.

4. If having regard to the intervals between successive payments it is desired so to do, the calculation of interest may be made by reference to weeks instead of months, and in such a case the foregoing paragraphs shall have effect as though in paragraph 2 the word "weeks" were substituted for the words "calendar months," and in paragraph 3 the words "one-fifty-second," were substituted for the words "one-twelfth".

5. Where any interval between successive payments is not a number of complete weeks or complete months, the foregoing paragraphs shall have effect as though one day were one-seventh part of a week or one-thirtieth part of a month, as the case may be.

SECOND SCHEDULE.

ENACTMENTS REPEALED.

Session and Chapter.	Short Title.	Extent of Repeal.
63 & 64 Vict. c. 51.	The Moneylenders Act, 1900.	Section two; section three; in paragraph (e) of section six the words "registration under"
1 & 2 Geo. 5. c. 38.	The Moneylenders Act, 1911.	The whole Act.

The Bengal Money-Lenders Act

Bengal Act VII of 1933

Published in the Calcutta gazette, dated the 26th October, 1933.

An act to provide more effectual control of moneylending in Bengal.

Whereas it is expedient to make better provision for the control of money-lending and to give additional powers to Courts to deal with money-lending in Bengal;

And whereas the previous sanction of the Governor-General has been obtained under sub-section (3) of section 80A of the Government of India Act to the passing of this Act;

It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This act may be called the Bengal Money-lenders Act 1933.

(2) It extends to the whole of Bengal:—

Provided that nothing in this Act shall apply to any loan made within the limits of the Ordinary Original Jurisdiction of the High Court or under a contract made within those limits.

(3) It shall come into force on such date as the Local Government may, by notification in the *Calcutta Gazette*, appoint.

2. In this act, unless there is anything repugnant in the subject or context—

Definitions.

(*1*) "money-lender" means any person who grants a loan of money; and

(*2*) "prescribed" means prescribed by rules made under this Act.

Presumption in case of certain loans.

3. Where in any suit in respect of any money lent by a money-lender after the commencement of the Usurious Loans Act, 1918, it is found that the interest charged exceeds the rate of fifteen *per cent. per annum* in the case of a secured loan or twenty-five *per cent. per annum* in the case of an unsecured loan or that

there is a stipulation for rests at intervals of less than six months, the Court shall, until the contrary is proved presume for the purpose of section 3 of the Usurious Loans Act, 1918, that the interest charged is excessive and that the transaction was harsh and unconscionable and was substantially unfair, but this provision shall be without prejudice to the powers of the Court under the said section where the Court is satisfied that the interest charged though not exceeding fifteen *per cent. per annum* or twenty-five *per cent. per annum*, as the case may be, is excessive.

Power to limit interest recoverable in certain cases.

4. Notwithstanding anything in any other Act, where in any suit in respect of any money lent by a money-lender before the commencement of this Act it is found that the arrears of interest amount to a sum greater than the principal of the loan, the Court, unless it is satisfied that the moneylender had reasonable grounds for not enforcing his claim earlier, shall limit the amount of such interest recoverable in the suit to an amount equal to the principal of the loan.

Maximum rate of interest recoverable under a contract which provides for the payment of compound interest.

5. No money-lender shall recover by suit interest of any kind at a rate exceeding ten *per cent. per annum* in respect of any loan made after the commencement of this Act, under a contract which provides for the payment of compound interest.

Bar to recovery of interest exceeding the principal.

6. No Court shall, in respect of any loan made after the commencement of this Act, decree on account of arrears of interest a sum greater than the principal of the loan.

Money-lender to supply debtor with particulars of loan.

7. (1) Every money-lender, on demand made in the prescribed form by a debtor by registered post, shall supply such debtor with such particulars as may be prescribed concerning any loan made by him to the debtor on account of which any sum is due from the debtor:

(2) A money-lender who sends by registered post to the debtor at the address mentioned in the form of demand the particulars referred to in sub-section (1) shall be presumed to have complied with the demand made under that sub-section.

(3) Where a money-lender has complied with a demand made by a debtor under sub-section (1) the debtor shall not be entitled to make a further demand under the said sub-section in respect of the same loan within a period of six months from the date of such compliance.

Failure to supply particulars under sec. 7.

8. If a money-lender to whom a demand has been made in accordance with the provisions of sub-section (1) of section 7 fails without reasonable excuse to comply therewith within a month from the date of the service of the demand, interest shall not be chargeable in respect of the loan concerning which the demand was made for so long as the default continues.

Deposit in Court of money due to money-lender.

9. (1) When a debtor has sent to a money-lender by postal money-order any sum of money due from him to the money-lender in respect of a loan and the money-lender has refused to accept the same the debtor may apply in the prescribed manner to the lowest Civil Court having jurisdiction over the place where he resides for permission to deposit the said sum in Court to the account of the money-lender and the Court on receiving the prescribed fee from the debtor shall keep the said sum in deposit and shall send a notice of the deposit in the prescribed manner to the money-lender.

(2) If a money-lender accepts money sent in the manner specified in sub-section (1) by a debtor or withdraws money deposited under the said sub-section he shall not be bound by any statement made by the debtor in remitting or depositing the money.

10. (1) The Local Government may make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters namely :—

Rules.

(*i*) the form of a demand by a debtor and the particulars to be supplied by a money-lender under sub-section (1) of section 7; and

(*ii*) the manner in which an application for deposit is to be made under sub-section (1) of section 9, the fee to be paid for such application, and the manner in which a notice of the deposit is to be sent to the money-lender.

(3) The powers conferred by this section on the Provincial Government shall, in relation to banking business carried on by any corporation, be powers of the Central Government.

THE USURIOUS LOANS ACT

ACT NO. X OF 1918.

[PASSED BY THE INDIAN LEGISLATIVE COUNCIL.]

(*Received the assent of the Governor-General on the 22nd March, 1918*).

(As amended by Act XXVIII of 1926)

An Act to give additional powers to Courts to deal in certain cases with usurious loans of money or in kind.

Whereas it is expedient to give additional powers to Courts to deal in certain cases with usurious loans of money or in kind; It is hereby enacted as follows :—

CHAPER I.

PRELIMINARY

Short title and extent.

1. (*1*) This Act may be called the Usurious Loans Act, 1918.

(*2*) It extends to the whole of British India, including British Beluchistan.

(3) The Local Government may, by notification in the local official gazette, direct that it shall not apply to any area, class of persons, or class of transactions which it may specify in its notification.

CHAPTER II.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) 'Interest' means rate of interest and includes the return to be made over and above what was actually lent, whether the same is charged or sought to be recovered specifically by way of interest or otherwise.

(2) 'Loan' means a loan whether of money or in kind and includes any transaction which is, in the opinion of the Court, in substance a loan.

(3) "Suit to which this Act applies" means any suit—

(a) for the recovery of a loan made after the commencement of this Act; or

(b) for the enforcement of any security taken or agreement, whether by way of settlement of account or otherwise, made, after the commencement of this Act, in respect of any loan made either before or after the commencement of this Act; or

(c) for the redemption of any security given after the commencement of this Act in respect of any loan made either before or after the commencement of this Act.

CHAPTER III.

Re-opening of transactions.

3. (1) Notwithstanding anything in the Usury Laws Repeal Act, 1855, where, in any suit to which this Act applies whether heard *ex parte* or otherwise, the Court has reason to believe,—

(a) that the interest is excessive; and

(b) that the transaction was, as between the parties thereto, substantially unfair, the Court may exercise all or any of the following powers namely, may—

(*i*) re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any excessive interest ;

(*ii*) notwithstanding any agreement, purporting to close previous dealings and to create a new obligation, reopen any account already taken between them and relieve the debtor of all liability in respect of any excessive interest, and if anything has been paid or allowed in account in respect of such liability, order the creditor to repay any sum which it considers to be re-payable in respect thereof :—

(*iii*) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, and if the creditor has parted with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just :

Provided that in the exercise of these powers, the Court shall not—

(*i*) re-open any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties or any persons from whom they claim at a date more than *twelve* years from the date of the transaction ;

(*ii*) do anything which affects any decree of a Court.

EXPLANATION—In the case of a suit brought on a series of transactions the expression 'the transaction' means, for the purposes of proviso (*i*), the first of such transactions.

(2) (a) In this Section "excessive" means in excess of that which the Court deems to be reasonable having regard to the risk incurred as it appeared, or must be taken to have appeared, to the creditor at the date of the loan.

(b) In considering whether interest is excessive under this section, the Court shall take into account any amounts charged or paid, whether in money or in kind, for expenses, inquiries, fines, bonuses, premia, renewals or any other charges, and if compound interest is charged, the periods at which it is calculated, and the total advantage which may reasonably be taken to have been expected from the transaction.

(c) In considering the question of risk, the Court shall take into account the presence or absence of security and the value thereof, the financial condition of the debtor and the result of any previous transactions of the debtor, by way of loan, so far as the same were known, or must be taken to have been known, to the creditor.

(d) In considering whether a transaction was substantially unfair, the Court shall take into account all circumstances materially affecting the relation of the parties at the time of the loan or tending to show that the transaction was unfair, including the necessities or supposed necessities of the debtor at the time of the loan so far as the same were known or must be taken to have been known, to the creditor.

EXPLANATION—Interest may of itself be sufficient evidence that a transaction was substantially unfair.

(3) This section shall apply to any suit, whatever its form may be, if such suit is substantially one for the recovery of a loan or for the enforcement of any agreement or security in respect of a loan, *or for the redemption of any such security*.

(4) Nothing in this section shall affect the rights of any transferee for value who satisfies the Court that the transfer to him was *bona fide*, and that he had at the time of such transfer no notice of any fact which would have entitled the debtor as against the lender to relief under this section.

For the purposes of this sub-section the word 'notice' shall have the same meaning as is ascribed to it in Sec. 4 of the Transfer of Property Act, 1882.

(5) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any Court.

CHAPTER IV.

Insolvency proceedings.

4. On any application relating to the admission or amount of a proof of a loan in any insolvency proceedings, the Court may exercise the like powers as may be exercised under section 3 by a Court in a suit to which this Act applies.

THE USURY LAWS REPEAL ACT

ACT XXVIII OF 1855.

RECEIVED THE G. G'S. ASSENT ON THE 19TH SEPTEMBER, 1855.

An Act for the repeal of the Usury Laws.

Preamble.

Whereas it is expedient to repeal the laws now in force relating to Usury; it is enacted as follows :—

1. [Repeal of enactment] Repealed by the Repealing Act (XIV of 1870).

Rate of interest to be decreed by Courts.

2. In any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties, and, if no rate shall have been agreed upon, at such rate as the Court shall deem reasonable.

Rate or interest upon a judgment or decree.

3. Whenever a Court shall direct that a judgment or decree shall bear interest, or shall award interest upon a judgment or decree, it may order the interest to be calculated at the rate allowed

in the judgment or decree upon the principal sum adjudged, or at such other rate as the Court shall think fit.

Contract for usufruct of property in lieu of interest.

4. A mortgage or other contract for the loan of money by which it is agreed that the use or usufruct of any property shall be allowed in lieu of interest, shall be binding upon the parties.

Amount of interest to be deposited in certain cases of conditional sales under Bengal Regulations.

5. Whenever, under the Regulations of the Bengal Code, a deposit may be made of the principal sum and interest due upon any mortgage or conditional sale of land hereafter to be entered into, the amount of interest to be deposited shall be at the rate stipulated in the contract or, if no rate has been stipulated and interest be payable under the terms of the contract, at the rate of twelve per centum per annum: Provided that, in the latter case, the amount deposited shall be subject to the decision of the Court as to the rate at which interest shall be calculated.

Rate of interest on future adjustments of accounts.

6. In any case in which an adjustment of accounts may become necessary between the lender and the borrower of money upon any mortgage, conditional sale of landed property, or other contract whatsoever, which may be entered into after the passing of this Act, interest shall be calculated at the rate stipulated therein; or, if no rate of interest shall have been stipulated, and interest be payable under the terms of the contract, at such rate as the Court shall deem reasonable.

7. [*Saving of prior transaction*] Repealed by the Repealing Act (XIV of 1870).

8. [*Commencement of Act*] Repealed by the Repealing Act (XIV of 1870).

SCHEDULE OF REPEALED ENACTMENTS.

[*Repealed by the Repealing Act*] (XIV of 1870).

INDIAN CONTRACT ACT
(ACT IX OF 1872.)

Compensation for loss or damage caused by breach of contract.

S. 73. When a contract has been broken, the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things, from such breach, or which the parties knew, when they made the contract to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

(n) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B, in consequence of not receiving the money on that day, is unable to pay his debts, and is totally ruined : A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.

Compensation for breach of contract where penalty stipulated for.

S. 74. When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named, or, as the case may be, the penalty stipulated for.

EXPLANATION—A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

ILLUSTRATIONS.

(*d*) A gives B a bond for the repayment of Rs. 1,000 with interest at 12 per cent. at the end of six months with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent. from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

(*e*) A, who owes money to B, a moneylender, undertakes to repay him by delivering to him 10 maunds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.

(*f*) A undertakes to repay B a loan of Rs. 1,000 by five equal monthly instalments with a stipulation that, in default of payment of any instalment, the whole shall become due: This stipulation is not by day of penalty, and the contract may be enforced according to its terms.

(*g*) A borrows Rs. 100 from B, and gives him a bond for Rs. 200 payable by five yearly instalments of Rs. 40, with a stipulation that, in default of payment of any instalment, the whole shall become due. This is a stipulation by way of penalty.

The Bihar Money Lenders Act

Act III of 1938

An Act to regulate money-lending transactions and to grant relief to debtors in the Province of Bihar.

Whereas it is expedient to regulate money-lending transactions and to grant relief to debtors in the Province of Bihar;

It is hereby enacted as follows—

CHAPTER I.

Preliminary.

Short title, extent and commencement.

1. (1) This Act may be called the Bihar Money-Lenders Act, 1938.

(2) It extends to the whole of the Province of Bihar.

(3) It shall come into force on such date as the Governor may, by notification, appoint, and different dates may be so appointed for different provisions.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "Court" includes the Registrar, any person exercising the powers of the Registrar or deciding a dispute, a liquidator and an arbitrator under the Bihar and Orissa Co-operative Societies Act, 1935, and also includes a Certificate-officer under the Bihar and Orissa Public Demands Recovery Act, 1914;

(b) Rep.

(c) Rep.

(d) "interest" means rate of interest and includes the return to be made over and above what was actually lent, whether the same is charged or sought to be recovered specifically by way of interest or otherwise;

(e) Rep.

(f) "loan" means an advance whether of money or in kind on interest made by a money-lender, and shall include a transaction on a bond bearing interest executed in respect of past liability and any transaction which, in substance, is a loan, but shall not include—

(*i*) a loan advanced by the Provincial Government or by any local body authorised by the Provincial Government;

(*ii*) a deposit of money in a Post Office Savings Bank or a deposit of money or other property in any other Bank or in a company or with a Co-operative Society registered or deemed to be registered under the Bihar and Orissa Co-operative Societies Act, 1935;

Explanation.—(1) A bond bearing intérest executed in respect of goods taken on credit constitutes a loan.

(2) A supply of goods on credit is not a loan.

(g) "money-lender" means a person who advances a loan and shall include a Hindu undivided family and legal representatives and the successors-in-interest, whether by inheritance, assignment or othewise, of a person who advances a loan;

(h) "prescribed" means prescribed by rules made under this Act;

(i) "principal" means in relation to a loan the amount actually lent to the debtor;

(j) "registered money-lender" means a person to whom a registration certificate has been granted under section 5, and shall include a Hindu undivided family and the legal representatives and successors-in-interest, whether by inheritance, assignment or otherwise, of a registered money-lender;

(k) Rep.

(l) "Sub-Registrar" means a Sub-Registrar appointed under the Indian Registration Act, 1908;

(m) "suit" includes any proceeding taken for the recovery of a loan before the Registrar, or any person exercising the powers of the Registrar or deciding a dispute, or a liquidator or an arbitrator under the Bihar and Orissa Co-operative Societies Act, 1935, and also includes an appeal, and

(n) Rep.

Power of Provincial Government to exempt any money-lender or class of money-lenders or any class of loans from provisions of this Act.

3. The Provincial Government may, by notification, for any special reason or reasons to be stated in such notification, exempt any money-lender or class of money-lenders or any class of loans in the whole or any part of the Province of Bihar from the operation of all or any of the provisions of this Act.

CHAPTER II.

Registration of money-lenders and account to be kept by money-lenders.

Register of money-lenders.

4. (1) Every Sub-Registrar shall maintain a register of money-lenders in such form and containing such particulars as may be prescribed.

(2) Such register shall be deemed to be a public document within the meaning of the Indian Evidence Act, 1872.

Registration of money-lenders and registration fee.

5. (1) Any person may make an application to be registered as a money-lender.

Every such application shall be in writing and shall state:—

(a) the name and address of the applicant;

(b) the name and style under which he carries on or desires to carry on business as a money-lender ;

(c) the principal place of his business and the branches thereof, if any;

(d) whether any certificate of registration previously granted to him under this Act has been cancelled; and

(e) such other particulars as may be prescribed.

(2) (a) Every application made under sub-section (1) shall be accompanied by the prescribed registration fee and shall be presented to the Sub-Registrar within whose jurisdiction the principal place of business referred to in clause (c) of sub-section (1) is situate.

(b) Any such application, which is not accompanied by the prescribed registration fee or does not contain the particulars specified in sub-section (1), shall be summarily rejected.

(3) The Provincial Government may, by rules prescribe for different classes of money-lenders and for different areas a registration fee not exceeding twenty-five rupees to be paid by an applicant for registration.

Provided that the Governor may, by notification, exempt any person or class of persons from the payment of the registration fee either generally or in any specified area.

(4) On receipt of an application under clause (a) of sub-section (2) the Sub-Registrar shall, except where a certificate previously granted to the applicant has been cancelled under section 19 and the order of cancellation is in force, grant a registration certificate in the prescribed form to the applicant.

6. A registration certificate granted under section 5 shall, unless sooner cancelled under section 19, be in force for five years from the date on which it is granted.

Duration of registration certificate.

7. (1) Every registered money-lender shall, in respect of every loan advanced by him after the commencement of this Act and every transaction made by him after the commencement of this Act relating to any loan advanced by him before the commencement of this Act.—

Duty of registered money-lender to maintain accounts and to give receipts.

(a) regularly record and maintain, or cause to be recorded or maintained, an account showing for each debtor—

(*i*) the date of the loan, the amount of the principal of the loan and the rate per centum per annum of interest charged on the loan;

(*ii*) the amount of every payment received by the money-lender in respect of the loan, and the date of such payment; and

(*iii*) any other terms which may be agreed on between the money-lender and the debtor:

(b) give to the debtor, or his agent, a receipt for every sum paid by, or on behalf of the debtor, duly signed and, if necessary, stamped at the time of such payment;

(c) deliver or send by registered post to the debtor, or his agent, within fifteen days of advancing the loan, a copy of the entries recorded under sub-clauses (*i*) and (*iii*) of clause (a).

(d) deliver or send by registered post to the debtor or his agent at least once in every calender year statement of account signed by himself or his agent showing the balance or amount that may be outstanding against such debtor on account of the principal and interest at the time of delivering or sending by registered post the said statement of account, and the amount of every payment received by the money-lender in respect of the loan, and the date of such payment, during the period to which the statement relates; and

(e) give to the debtor a signed receipt for every pawned article with its general description, immediately after it is pawned, mentioning the amount for which it is pawned.

(2) A person to whom a copy of entries in an account has been delivered or sent under clause (c) of sub-section (1) or a statement of account has been delivered or sent under clause (d) of sub-section (1), and who fails to object to the correctness of the account or the statement of account shall not, by such failure alone, be deemed to have admitted the correctness of such account or such statement of account.

CHAPTER III.

Sections 8 to 18 have been repealed by Section 18 of Bihar Act VII of 1939.

CHAPTER IV.

Penalties and Procedure.

Power of Collector to cancel registration certificate.

19. (1) Where in any suit brought in respect of a loan by a registered money-lender or in respect of any security taken for a loan by a registered money-lender, the Court is of opinion that the registered money-lender has been guilty of fraud, or of any contravention of the provisions of this Act, or is otherwise unfit to carry on the business of money-lending, the Court shall make a report to the Collector, and the Collector may, on receipt of such report and after a due and proper inquiry, cancel for such period, not exceeding five years, as he thinks fit the registration certificate granted to the money-lender.

(2) When the certificate of a registered money-lender has been cancelled under sub-section (1) such money-lender shall not be entitled to make any application under section 5 during the period in which such order of cancellation remains in force.

Penalty for the contravention of the provision of section 7.

20. (1) If any money-lender or his agent wilfully contravenes any of the provisions of clause (a) of sub-section (1) of section 7, such money-lender or agent, as the case may be, shall be punishable with imprisonment which may extend to one year or with fine not exceeding five hundred rupees or with both.

(2) Any money-lender who contravenes any of the provisions of section 7 other than the provision of clause (a) of sub-section (1) of that section shall be punishable with fine not exceeding five hundred rupees.

Penalty for taking *salami, batta, gadiana* etc.

21. If after the commencement of this Act, any money-lender or his agent takes from a debtor at the time of advancing a loan or deducts out of the principal of such loan any *salami, batta, gadiana* or other exactions of a similar nature by whatever name called or known, such money-lender or his agent as the case may be, shall be punishable with fine.

CHAPTER V.

Miscellaneous.

22. Repealed by section 18 Bihar Act VII of 1939.

Contract for payment outside the province void.

23. Notwithstanding anything to the contrary contained in any other law or in anything having the force of law, any contract entered into between a money-lender and his debtor in respect of a loan advanced after the commencement of this Act providing for the payment of the amount due on such loan at any place outside the province of Bihar shall be void.

Power to deposit in Court money due on loan.

24. (1) When a debtor tenders to a money-lender or his agent money on account of any interest due on a loan or on account of the principal of a loan and the money-lender or his agent refuses to receive the amount tendered or refuses to grant a receipt for the same, the debtor may deposit, in any Court in which the money-lender might have instituted a suit for the recovery of such interest or such loan, to the account of the money-lender the amount tendered as aforesaid.

(2) The Court shall thereupon forthwith grant a receipt for the deposit under the seal of the Court and cause a written notice of the deposit to be served upon the money-lender.

(3) The money-lender may at any time within three years after the date of the service upon him of the notice mentioned in sub-section (2) make an application to the Court praying for the amount deposited as aforesaid to be paid to him.

(4) If no application is made under sub-section (3) within the period mentioned in the said sub-section, the amount deposited shall be disposed of in the prescribed manner.

(5) Upon receipt of an application under sub-section (3) the Court may order such amount to be paid to the applicant upon such terms and subject to such conditions as may be specified in the order.

Court's receipt to operate as acquittance.

25. A receipt given by the Court under sub-section (2) of section 24 shall operate as an acquittance for the amount deposited as aforesaid in the same manner and to the same extent as if that amount had been received by the money-lender to whose credit the deposit was made, on the date of such deposit.

26. Repealed by Sec. 18 Bihar Act VII of 1939.

Power to make rules.

27. The Provincial Government may make rules prescribing.

(a) the form of the register mentioned in sub-section (1) of section 4 and the particulars to be contained in such register;

(b) the form of the registration certificate mentioned in sub-section (4) of section 5;

(c) the particulars to be contained in an application made under sub-section (1) of section 5;

(d) the registration fee to be paid under section 5; and

(e) the manner in which deposits made under sub-section (4) of section 24 shall be disposed of.

The Bihar Money-lenders (Regulation of Transactions) Act, 1939

BIHAR ACT VII OF 1939.

Received the assent of the Governor-General on 15th April, 1939 as published in the Bihar Extraordinary Gazette of the 1st May, 1939, No. 508 Leg., Part IV.

An Act to provide for the regulation of money-lending transactions in the Province of Bihar.

Pre-amble.

Whereas doubts have arisen regarding the validity of certain provisions of the Bihar Money-lenders Act, 1938 ; and whereas for the purpose of removing such doubts it is expedient to repeal the said provisions and provide for the regulation of money-lending transactions in the province of Bihar ;

It is hereby enacted as follows:—

CHAPTER I.

Preliminary.

Short title, extent and commencement.

1. (1) This Act may be called the Bihar Money-lenders (Regulation of Transactions) Act, 1939.

(2) It extends to the whole of the Province of Bihar.

(3) It shall come into force on such date as the Provincial Government may, be notification, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "Court" includes the Registrar, any person exercising the powers of the Registrar, any person deciding a dispute, a liquidator and an arbitrator under the Bihar and Orissa Co-operative Societies Act, 1935, and also includes a Certificate-Officer under the Bihar and Orissa Public Demands Recovery Act, 1914;

(b) "decree" includes an award and an order of contribution passed under the Bihar and Orissa Co-operative Societies Act, 1935;

(c) "decree-holder" includes a certificate-holder under the Bihar and Orissa Public Demands Recovery Act, 1914;

(d) "interest" means rate of interest and includes the return to be made over and above what was actually lent, whether the same is charged or sought to be recovered specifically by way of interest or otherwise;

(e) "judgment-debtor" includes a certificate-debtor under the Bihar and Orissa Public Demands Recovery Act, 1914;

(f) "loan" means an advance, whether of money or in kind, on interest made by a money-lender, and shall include a transaction on a bond bearing interest executed in respect of past liability and any transaction which, in substance, is a loan, but shall not include—

(*i*) a loan advanced by the Provincial Government or by any local body authorised by the Provincial Government;

(*ii*) a deposit of money in a Post Office Savings Bank or a deposit of money or any other property in any other bank or in a company or with a Co-operative Society registered, or deemed to be registered, under the Bihar and Orissa Co-operative Societies Act, 1935;

Explanation—(1) A bond bearing interest executed in respect of goods taken on credit constitutes a loan.

(2) A supply of goods on credit is not a loan.

(g) "money-lender" means a person who advances a loan and shall include a Hindu undivided family and the legal representatives and successors-in-interest, whether by inheritance, assignment or otherwise of a person who advances a loan;

(h) "principal" means in relation to a loan the amount actually lent to the debtor;

(i) "secured loan" means a loan for whcih the money-lender holds a mortgage, charge or lien on the property of the debtor or any part thereof as a security for that loan;

(j) "sub-registrar" means a sub-registrar appointed under the Indian Registration Act, 1908;

(k) "suit" includes any proceedings taken for the recovery of a loan before the Registrar, any person exercising the powers of the Registrar, any person deciding a dispute, a liquidator or an arbitrator under the Bihar and Orissa Co-operative Societies Act, 1935, and also includes an appeal; and

(1) "unsecured loan" means any loan other than a secured loan.

3. The Provincial Government, may by notification, for any special reason or reasons to be stated in such notification, exempt any money-lender or class of money-lenders or any class of loans in the whole or any part of the Province of Bihar from the operation of all or any of the provisions of this Act.

Exemption of money-lenders from operation of this Act.

CHAPTER II.

Provisions relating to suit in respect of loans and execution of decrees.

4. No Court shall entertain a suit by a money-lender for the recovery of a loan advanced by him after the commencement of this Act unless such money-lender was registered under the Bihar Money-lenders Act, 1938, at the time when such loan was advanced :

Suit for recovery of loan only maintainable by registered money-lenders.

Provided that such suit shall be entertainable if the loan to which the suit relates was advanced by the money-lender at any time before the expiration of six months after the date of the commencement of this Act and if he is granted a certificate of registration under section 5 of the Bihar Money-lenders Act, 1938, at any time before the expiration of the said six months.

5. Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract, no Court shall, in any suit brought by a money-lender in respect of a loan advanced after the commencement of this Act, pass a decree for interest at rates exceeding nine *per centum per annum* in the case of a secured loan and twelve *per centum per annum* in the case of an unsecured loan ;

Maximum rates.

6. Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract, an agreement entered into by a debtor for the payment of compound interest on loans advanced after the commencement of this Act shall be void.

Agreement for payment of compound interest void.

7. Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any agreement, no Court, shall, in any suit brought by a money-lender before or after the commencement of this Act in respect of a loan advanced before or after the commencement of this Act or

Maximum amount of interest which may be decreed.

in any appeal or proceedings in revision arising out of such suit, pass a decree for an amount of interest for the period preceding the institution of the suit, which, together with any amount already realised as interest through the Court or otherwise, is greater than the amount of loan advanced, or, if the loan is based on a document, the amount of loan mentioned in, or evidenced by such document.

Power of Court to re-open certain transaction.

8. In any suit brought by a money-lender before or after the commencement of this Act in respect of a loan advanced before the commencement of this Act or in any appeal or proceedings in revision arising out of such suit, the Court may exercise all or any of the following powers :—

(*a*) re-open the transaction, take an account between the parties, and relieve the debtor of all liability in respect of any interest in excess of nine *per centum* simple *per annum* in the case of a secured loan and twelve *per centum* simple *per annum* in the case of an unsecured loan;

(*b*) notwithstanding any agreement purporting to close previous dealings and to create a new obligation, re-open any account already taken between them and relieve the debtor of all liability in respect of any interest in excess of nine *per centum* simple *per annum* in the case of a secured loan and twelve *per centum* simple *per annum* in the case of an unsecured loan ;

(*c*) set aside either wholly or in part or revise or alter any security given or agreement made in respect of any loan, and, if the money-lender has parted with the security, order him to indemnify the debtor in such manner and to such extent as it may deem just;

Provided that, in the exercise of these powers, the Court shall not—

(*i*) re-open any agreement purporting to close previous dealings and to create a new obligation which has been entered into by the parties or any persons from whom they claim at a date more than twelve years before the institution of such suit;

(*ii*) do anything which affects any decree of a Court;

Provided further that if anything has been paid or allowed in respect of any liability for interest in excess of nine *per centum* simple *per annum* in the case of a secured loan and twelve *per centum* simple *per annum* in the case of an unsecured loan, nothing in clause (*a*) or (*b*) shall be deemed to require the creditor to pay any amount so paid or allowed in excess or to reduce the amount of the principal of the loan.

9. If the equity of redemption of a mortgagor is transferred by sale otherwise than in execution of a decree, and, if out of the consideration money for the transfer any amount due under the mortgage in respect of interest for any period preceding the date of transfer is left in deposit with the transferee for payment to the mortgagee, the portion of the amount so left in deposit, which is in excess of the amount which would have been payable as interest at the rate of nine *per centum* simple *per annum* for such period, shall not, in any suit brought before or after the commencement of this Act, be taken into account for the purposes of section 8 and, notwithstanding anything to the contrary contained in the said section, the mortgagee shall, in any such suit, be entitled to recover the amount of such excess in addition to any amount which he may otherwise be entitled to recover.

Transfer of equity of redemption of a mortgagor by sale otherwise than in execution of a decree.

10. Notwithstanding anything to the contrary in any other law or in anything having the force of law or in the any contract between the the money-lender and the person to whom the loan was advanced, the Court may, subject to the provisions of section 12, order at the time of passing the decree in any suit brought before or after the commencement of this Act relating to a mortgage by which any loan is secured that any amount decreed in such suit shall be paid in such number of instalments and subject to such conditions and on such dates as it considers fit.

Decree may order payment of amount due on mortgage by instalments.

11. Notwithstanding anything to the contrary contained in any other law or in anything having the force of law or in any contract between the money-lender and the person to whom the loan was advanced, the Court may, subject to the provision of section 12, direct at any time on the application of the judgment-debtor, after notice to the decree-holder that the amount of any decree passed before or after the commencement of this Act, in respect of a loan, including any decree in a suit relating to a mortgage by which a loan is secured, shall be paid in such number of instalments and subject to such conditions and on such dates as it considers fit.

Power to direct payment of amount due in respect of a loan or on mortgage by instalments.

12. Before fixing the instalments referred to in sections 10 and 11, the Court shall take into consideration the circumstances of the judgment-debtor, the amount of the decree and the capacity of the judgment-debtor to pay the instalments on the due dates.

Circumstances which Court should consider in fixing instalments.

Court to estimate the value of judgment-debtors property.

13. (1) When an application is made before or after the commencement of this Act for the execution of decree passed in respect of a loan or interest on a loan by the sale of the judgment-debtor's property, the Court executing the decree shall, notwithstanding anything to the contrary contained in any other law or in anything having the force of law, hear the parties to the decree and estimate the value of such property and of that portion of such property the proceeds of the sale of which it considers will be sufficient to satisfy the decree:

Provided that the Court may order the whole property of the judgment-debtor to be sold if it is satisfied that by reason of the nature of such property or any other special circumstances such property cannot reasonably and conveniently be sold in part.

(2) Any person aggrieved by an order passed under sub-section (1) may appeal to the Court to which appeals from the Court executing the decree ordinarily lie.

Only sufficient portion of judgment-debtors' property to be sold.

14. Notwithstanding anything to the contrary contained in any other law or in anything having the force of law the proclamation of the intended sale of property in execution of a decree passed before or after the commencement of this Act in respect of a loan or the interest on a loan shall include only so much of the property of the judgment-debtor the proceeds of the sale of which the Court considers will be sufficient to satisfy the decree and shall state the value of the property or portion of the property to be sold, as determined under section 13; and such property or portion of the property, as the case may be, shall not be sold at a price lower than the price specified in the said proclamation:

Provided that if the property to be sold is immovable and the decree-holder specifies which portion of such property should be sold the Court shall order that such portion or so much of such portion as may seem necessary to satisfy the decree shall be sold;

Provided further that if the highest amount bid for the property included in the sale proclamation is less than the price specified for such property in the proclamation, the Court may sell the property for such highest amount if the decree-holder consents in writing to forego so much of the amount decreed as is equal to the difference between the highest amount bid and the price specified for such property in the sale proclamation.

Exemption of portion of holding from attachment or sale in execution of decree.

15. (1) Notwithstanding anything to the contrary contained in any other law or in anything having the force of law, where a decree is passed before or after the commencement of this Act for the payment by an agricultural debtor of the amount due on any loan advanced to him by a money-lender, the Court executing the decree—

(*i*) shall exempt from sale one acre of the land comprised in the holding or holdings of the judgment-debtor, if the area of such land does not exceed three acres; and

(*ii*) shall exempt one acre, and may exempt any further portion of such land if the area of such land exceeds three acres; provided that the total area exempted from the sale does not exceed one-third of the total area of such land.

(2) For the purposes of this section 'agricultural debtor' means a raiyat the total area of whose holding or holdings does not exceed such area as the Provincial Government may fix for the district or part of the district in which such holding or holdings are situate.

CHAPTER III.

Miscellaneous.

Saving of Court's powers under the Usurious Loans Act, 1918.

16. Save as otherwise provided in section 8, nothing in this Act shall affect the powers of a Court under the Usurious Loans Act, 1918.

Payment of loan in cash to debtor etc. to be made in the presence of the sub-registrar.

17. Where a loan is advanced on a registered document, the entire amount of the loan, or as much of it as may be payable in cash, shall be paid to the debtor or his duly authorised agent in the presence of the sub-registrar who will register the document and the said sub-registrar shall make an endorsement to that effect on the document.

Illustration.—The consideration for a mortgage bond for Rs. 5,000 is made up of the following sums:

(*i*) Rs. 1,000 already paid to the mortgagor several days before the execution of the bond;

(*ii*) Rs. 1,500 to be paid to him in cash at the time of the execution of the bond; and....

(*iii*) Rs. 2,500 to be paid to him in future as and when required by him.

Only the second out of these three sums (namely the sum of Rs. 1,500 to be paid at the time of the execution of the bond) shall be payable to the mortgagor or his duly authorised agent in the presence of the sub-registrar who will register the document.

Repeals.

18. The enactments specified in the Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

The Assam Money-lenders' Act, 1934.

ASSAM ACT IV OF 1934.

(Published in the Assam Gazette of the 27th June, 1934.)

An Act to provide for more effectual control of money-lending in Assam.

Preamble.

Whereas it is expedient to make better provision for the control of money-lending and to give additional powers to Courts to deal with money-lenders in Assam;

And whereas the previous sanction of the Governor-General has been obtained under sub-section (3) of section 80A of the Government of India Act to the passing of the Act.

It is hereby enacted as follows:—

Short title, extent and commencement.

1. (1) This Act may be called the Assam Money-Lenders Act, 1934.

(2) It extends to the whole of Assam including the territories mentioned in section 14 of the Assam General Clauses Act, 1915.

(3) It shall come into force on such date as the Local Government may by notification direct.

Definitions.

2. In this Act, unless there is any thing repugnant in the subject or context,—

(1) "Money-lender" means a person who grants a loan.

(2) "Interest" means rate of interest and includes the return to be made over and above what was actually lent whether the same is charged or sought to be recovered specifically by way of interest or otherwise;

(3) "Loan" means an advance (whether of money or in kind) at interest made by a money-lender and shall include any bond bearing interest executed in respect of past liabilities and any transaction which in substance is a loan; [*Explanation*:—A bond bearing interest executed in respect of goods taken on credit constitutes a loan.] and

(4) "Prescribed" means prescribed by rules made under this Act.

Penalty for stating larger amount in the bond than actually lent.

3. If the loan actually made be less than the sum entered in the bond or hand-note, the money-lender shall be guilty of a contravention of the provisions of this Act and shall, on conviction, be punishable with fine not exceeding two hundred rupees.

Prohibition of compound interest and provisions as to defaulting.

4. Any contract made after the commencement of this Act for the loan of money by a money-lender shall be illegal in so far as it provides directly or indirectly for the payment of compound interest or for the rate or amount of interest being increased by reason of any default in the payment of sums due under the contract:

Simple interest in case of default.

Provided that provision may be made by any such contract that if default is made in the payment upon the due date of any sum payable to the money-lender under the contract, whether in respect of principal or interest, or both, the money-lender shall be entitled to charge simple interest on that sum from the date of the default until the sum is paid, at a rate not exceeding the rate payable in respect of the principal apart from any default, and any interest so charged shall not be reckoned for the purposes of this Act as part of the interest charged in respect of the loan.

Prohibition of charge for expenses on loans by money-lenders.

5. Any agreement between a money-lender and a borrower or intending borrower for the payment by the borrower or intending borrower to the money-lender of any sum on account of costs, charges or expenses incidental to or relating to the negotiations for or the granting of the loan or proposed loan shall be illegal, and if any sum is paid to a money-lender by a borrower or intending borrower as for or on account of any such costs, charges or expenses, that sum shall be recoverable as a debt due to the borrower or intending borrower, or, in the event of the loan being completed, shall, if not so recovered, be set off against the amount actually lent and that amount shall be deemed to be reduced accordingly.

Exception:—This will not debar money-lenders from recovering reasonable costs of inspection of Revenue or Registration records including examination of titles and also costs of inspection of property, in cases where the contract includes a stipulation that property is given as security or by way of mortgage and where both parties have agreed to such costs and reimbursement thereof.

Keeping of accounts.

6. Every money-lender shall keep accounts in the form prescribed.

Obligation of money-lender to supply information as to state of loan and copies of documents relating thereto.

7. (1) In respect of every contract for the repayment of a loan made by money-lender, whether made before or after the commencement of this Act, the money-lender shall, on demand in writing being made by the borrower at the time of executing the contract or at any time during the continuance of the contract, supply to the borrower, or, if the borrower so requires, to any person specified in that behalf in the demand, a statement signed by the money-lender or his agent showing—

(*a*) the date on which the loan was made, the amount of the principal of the loan, and the rate per cent. per annum of interest charged; and

(*b*) the amount of any payment already received by the money-lender in respect of the loan and the date on which it was made; and

(*c*) the amount of every sum due to the money-lender, but unpaid, and the date upon which it became due and the amount of interest accrued due and unpaid in respect of every such sum; and

(*d*) the amount of every sum not yet due which remains outstanding and the date upon which it will become due:

Provided that when a demand under this sub-section has once been complied with, a second demand may not be made in respect of the same loan within six months.

Copy of document for borrower.

(2) A money-lender shall on demand in writing by the borrower, and on tender of the prescribed sum for expenses, supply a copy of any document relating to a loan made by him or any security therefor, to the borrower, or if the borrower so requires, to any person specified in that behalf in the demand.

Civil effects of non-compliance.

(3) If a money-lender to whom a demand has been made under this section fail without reasonable excuse to comply therewith within one month after the demand has been made, he shall not so long as the default continues be entitled to sue for or recover any sum due under the contract on account either of principal or interest, and interest shall not be chargeable in respect of the period of the default.

Presumption in the case of certain loans.

8. Where in any suit in respect of any loan made or any security taken for a loan made by a money-lender after the commencement of the Usurious Loans Act, 1918, it is found that the interest charged exceeds the rate of 12½ per

cent. per annum in the case of a secured loan or 18¾ per cent. per annum in the case of an unsecured loan, the Court shall, until the contrary is proved, presume for the purposes of section 3 of the Usurious Loans Act, 1918, that the interest charged is excessive and that the transaction was, as between the parties thereto, substantially unfair, but this provision shall be without prejudice to the powers of the Court under the said section where the Court is satisfied that the interest charged though not exceeding 12½ per cent. per annum or 18¾ per cent. per annum, as the case may be, is excessive.

Bar to recovery of interest exceeding the principal.

9. No Court shall, in respect of any loan made before or after the commencement of this Act, decree on account of arrears of interest a sum greater than the principal of the loan.

Deposit in Court of money due to money-lender.

10. (1) Where a borrower has sent to a money-lender by postal money order or by registered post with acknowledgment due any sum of money due from him to the money-lender in respect of a loan and the money-lender has refused to accept the same, the borrower may apply in the prescribed manner to the lowest Civil Court having jurisdiction over the place where he resides for permission to deposit the said sum in Court to the account of the money-lender, and the Court shall thereupon keep the sum in deposit and shall send a notice of the deposit in the prescribed manner to the money-lender.

(2) If the money-lender accepts money sent in the manner specified in sub-section (1) by a borrower or withdraws money deposited under the said sub-section, he shall not be bound by any statement made by the borrower in remitting or depositing the money.

Restrictions on money-lending advertisements.

11. (1) No person shall knowingly send or deliver or cause to be sent or delivered to any person except in response to his written request any circular or other document advertising the name or address of a money-lender, or containing an invitation—

(*a*) to borrow money from a money-lender ; or

(*b*) to enter into any transaction involving the borrowing of money from a money-lender ; or

(*c*) to apply to any place with a view to obtaining information or advice as to borrowing any money from a money-lender.

(2) No money-lender or any person on his behalf shall employ any agent or canvasser for the purpose of inviting any person to borrow money or to enter into any transaction involving the borrowing of money from a money-lender, and no person shall act as such agent or canvasser or demand or receive directly or indirectly any sum or other valuable consideration by way of commission or otherwise for introducing or undertaking to introduce to a money-lender any person desiring to borrow money.

Agents and canvassers inviting borrowers must not be employed by the money-lenders.

(3) Any person acting in contravention of any of the provisions of this section shall in respect of each offence be liable, on conviction to imprisonment for a term not exceeding three months or a fine not exceeding three hundred rupees or both.

Penalty.

(4) Where it is shown that a money-lending transaction was brought about by a contravention of any of the provisions of this section, the transaction shall be illegal, unless the money-lender proves that the contravention occurred without his consent or connivance.

Civil effects of contravention.

12. (1) Where in any suit in respect of any money lent or in respect of any security taken for money lent by a money-lender, the trying Court is of opinion that the money-lender has been guilty of fraud, or of any contravention of the provisions of this Act, or is otherwise unfit to carry on the business of money-lending, the Court may make an order debarring him from carrying on such business for such time as may be specified in the order and an appeal shall lie from such an order to the Court to which an appeal ordinarily lies under the provisions of the Code of Civil Procedure, 1908, irrespective of the money value of the suit.

Penalty in case of fraud.

(2) Any money-lender carrying on the business of money-lending in contravention of any order made under sub-section (1) shall, on conviction, be liable to a fine which may extend to five hundred rupees.

Penalty.

13. Any order of conviction passed under this Act shall be appealable to the Court to which appeal ordinarily lies under the Code of Criminal Procedure, 1898, irrespective of the amount of fine to which an accused may be sentenced.

Appeal.

14. (1) The Local Government may make rules for carrying out the purposes of this act.

Power of Local Government to make rules.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :—

(*i*) the form in which money-lenders shall keep accounts ;

(*ii*) the intervals at which borrowers may demand statements of accounts under sub-section (1) of section 7 and the fees to be paid for copies of documents supplied under sub-section (2) of the same section ;

(*iii*) the manner in which an application for a deposit is to be made under sub-section (1) of section 10, and a notice of the deposit is to be sent to the money-lender under the said sub-section ; and

(*iv*) the enforcement of orders made under sub-section (1) of section 12.

(3) The power to make rules under this Act shall be subject to the condition of previous publication.

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